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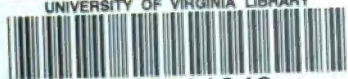
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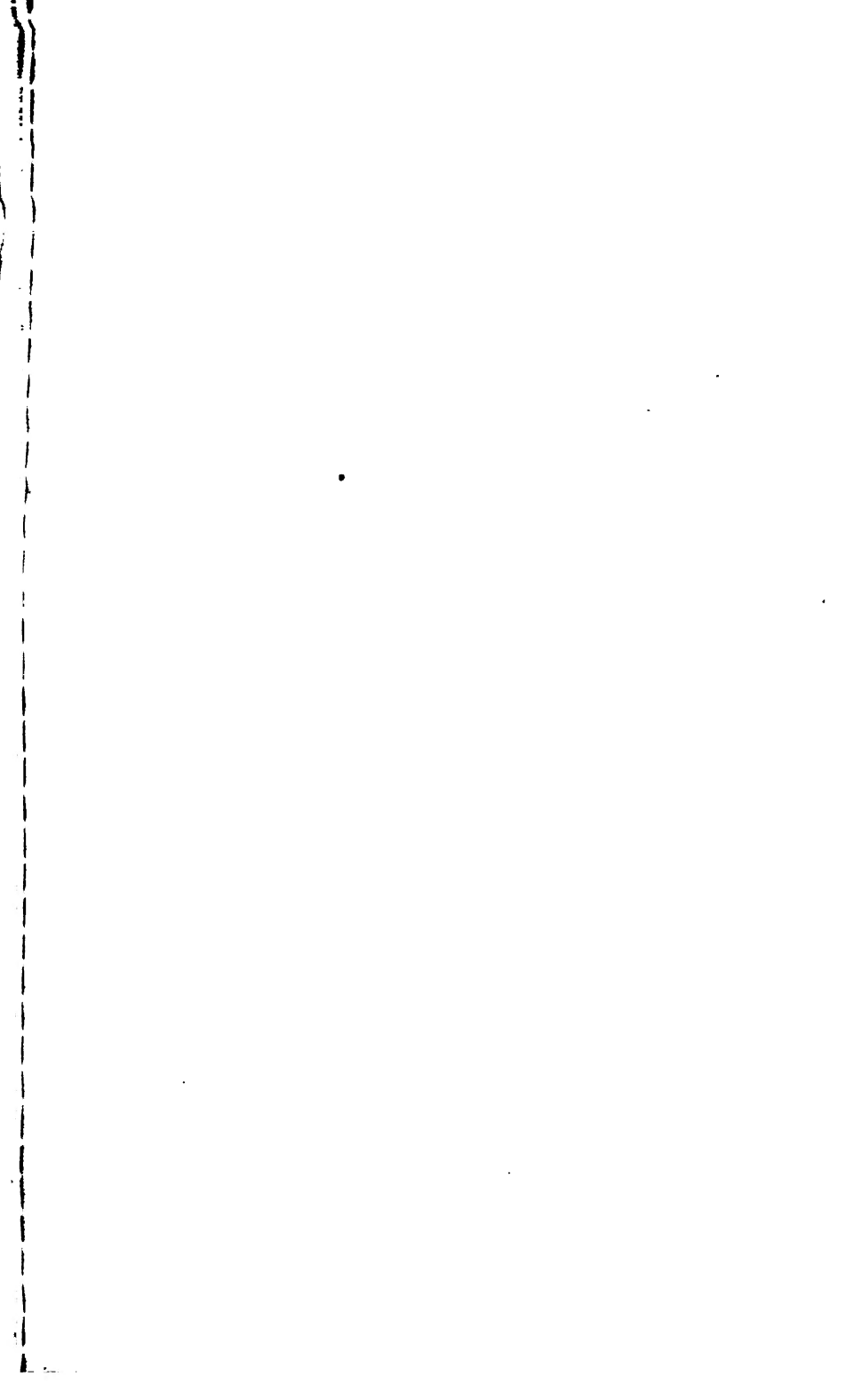
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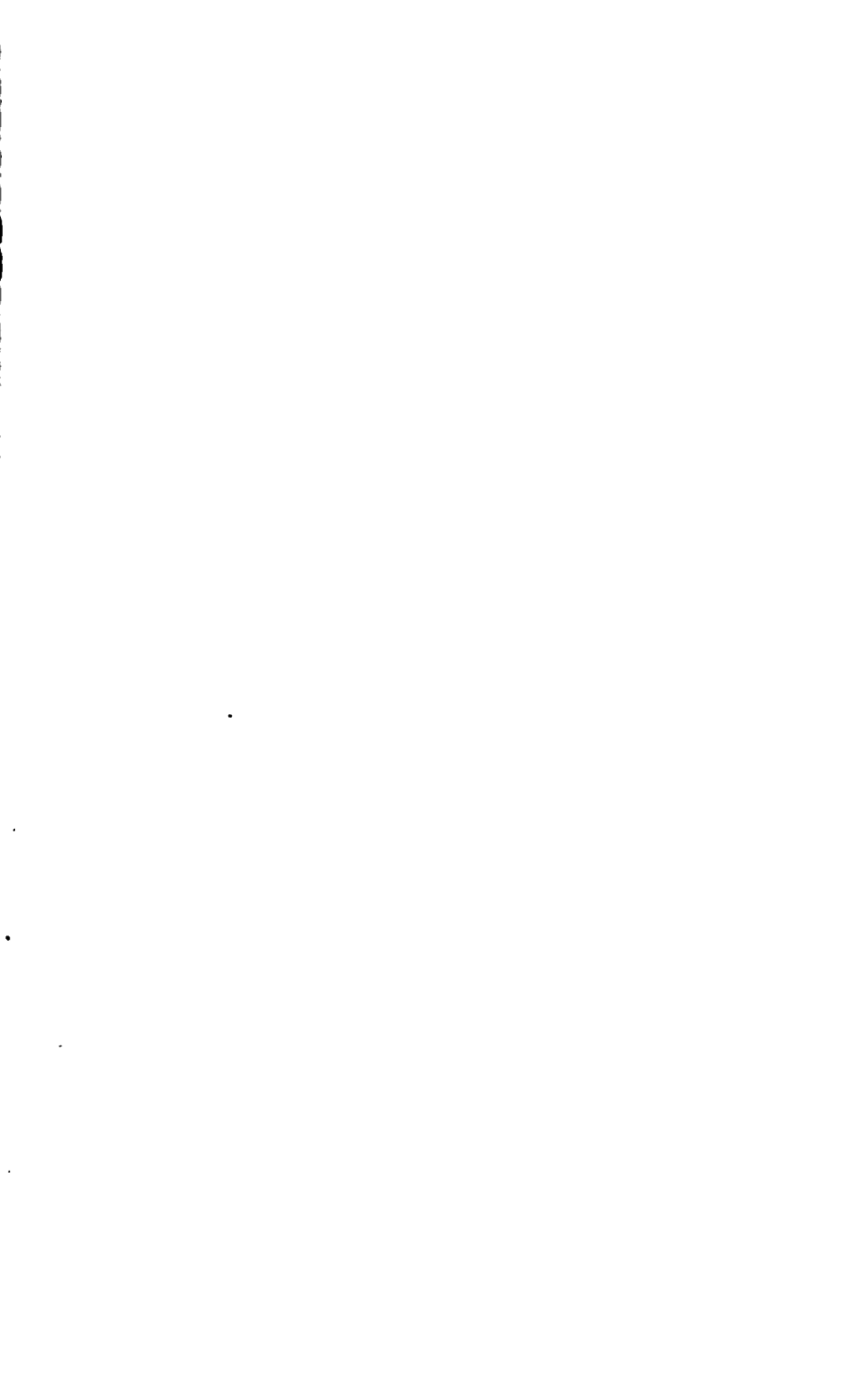
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN
THE COURT OF APPEALS
OF
VIRGINIA.

VOL. I.

Va. rep. t. v. 22
BY PEYTON RANDOLPH,
Counsellor at Law.

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1828.

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1921-23

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L. S.

BE-IT REMEMBERED, That on the sixteenth day of June, in the forty-seventh year of the independence of the United States of America, **PETER COTTON**, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as proprietor, in shewing, to wit: "*Reports of Cases argued and determined f Appeals of Virginia.—Vol. 1.—By Peyton Randolph, law.*" In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

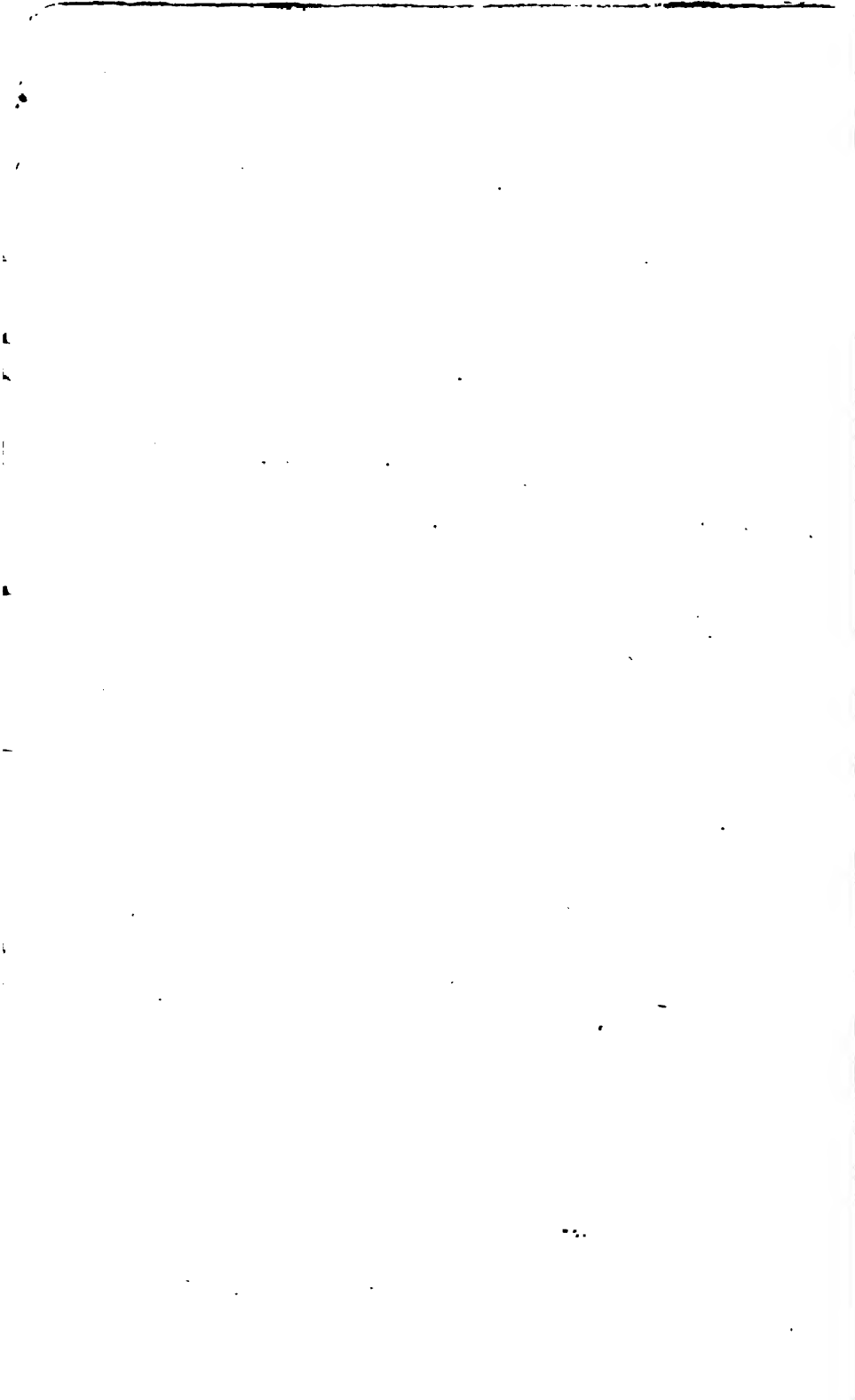
R'D JEFFRIES, Clerk
Of the district of Virginia.

TO THE
COURT OF APPEALS
OF
VIRGINIA,

THIS WORK IS RESPECTFULLY INSCRIBED,

BY

THE AUTHOR.



A TABLE

OF THE

NAMES OF THE CASES

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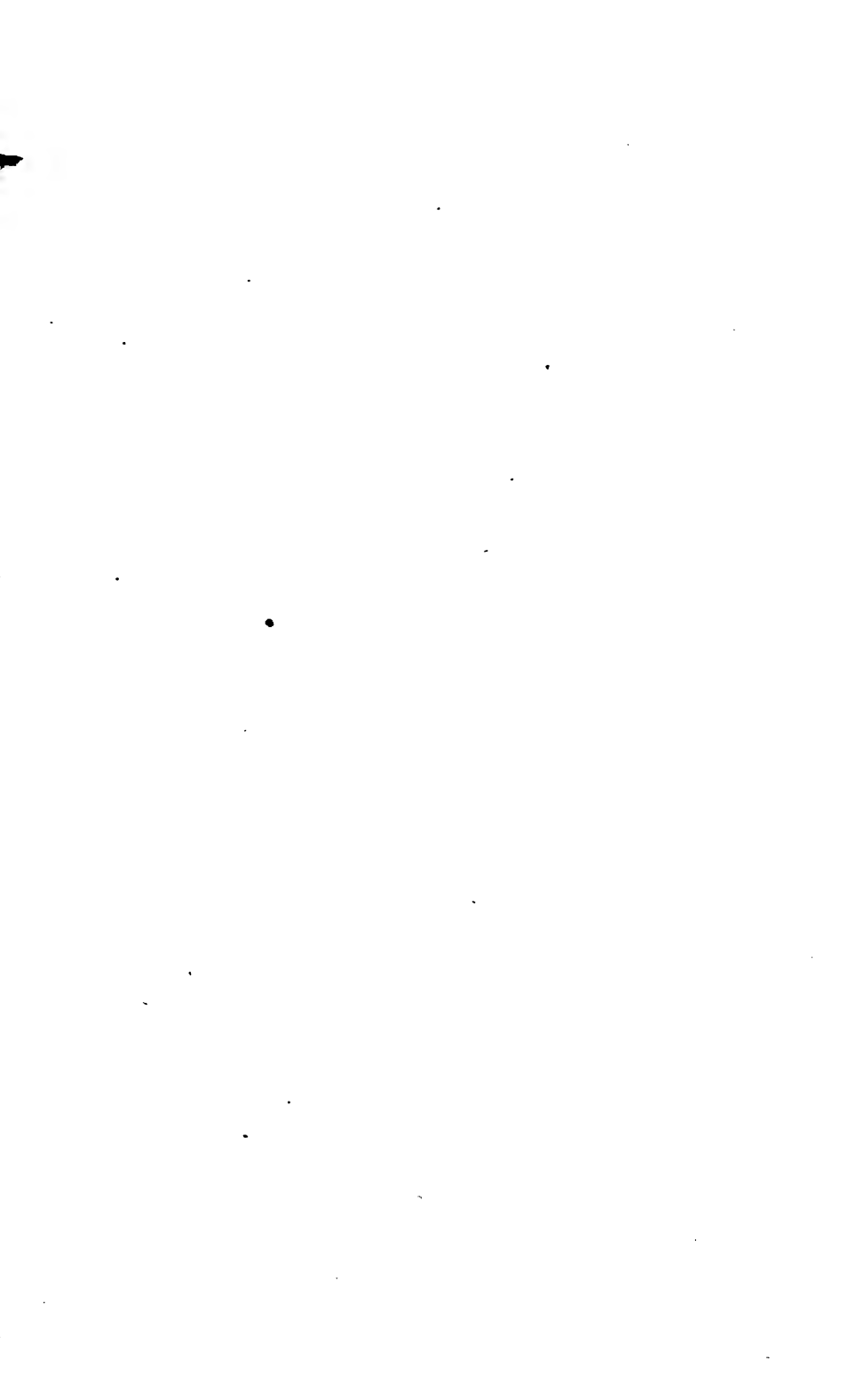
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JUDGES
OF THE
COURT OF APPEALS

DURING THE PERIOD OF THESE REPORTS.

WILLIAM FLEMING, Esquire, *President*.*

SPENCER ROANE, Esquire.†

FRANCIS T. BROOKE, Esquire.

WILLIAM H. CABELL, Esquire.

JOHN COALTER, Esquire.

JOHN W. GREEN, Esquire; who was appointed after the decease of Judge Roane, and took his seat on the 11th day of October, 1822.

* Judge Fleming was absent from indisposition, during the period reported in this volume.

† Judge Roane departed this life on the 4th day of September, 1822.

CASES
•
ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

**Burke, administrator, &c. against Levy's
executors.**

1821.
November.


Where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury ; or they may empanel a jury to try the issue, at their discretion.

Although the judgment on a forthcoming bond, should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection cannot be sustained in the court of appeals.

This was an appeal from the superior court of law for Richmond county. The appellee made a motion against the appellant and his surety on a forthcoming bond, which recited the execution with the legal costs attending the same, as amounting to 204*l.* 11*s.* 2*d.* ; but the execution itself is not made part of the record by bill of exceptions, nor does it appear that any objection was made in the court below to any excess in the judgment beyond the amount due by

1821.
November.

Burke,
adm'r
vs.
Levy's
executors.

the execution. The defendants in the motion put in a plea of *non est factum* and concluded to the country ; which plea was duly sworn to. The court rendered judgment for the plaintiff without empannelling a jury to try the issue of *non est factum*. The defendant, Burke, took an appeal to this court.

Stanard, for the plaintiff in error.

Leigh, for the defendant.

Two objections were made by the appellant to the judgment of the court below. 1st—That the bond was taken and the execution awarded thereon, for more than the amount of the execution on which the bond was taken. 2ndly—That the plea of *non est factum* ought to have been tried by a jury.

November 26—Judge ROANE, delivered the opinion of the court:

The court is of opinion, that as the jurisdiction in this case was given to the Superior Court, to proceed by motion in a summary way, although that court might have called in a jury to decide the points submitted by the plea, it was not compellable to do so, under the distinction taken by the court in the case of *Watson vs. Alexander*. (a)

The court is also of opinion, that although there may still exist an excess in the judgment of the Superior Court beyond the sum due by the execution, yet that execution not having been made a part of the record, by bill of exceptions or otherwise, and no objection having been made to the judgment on this point in the court below, that objection ought not to be now sustained in this court under the case of *Bronaugh vs. Freeman*. (b) There is no error, therefore, in the judgment, and it is to be affirmed.

(a) 1 Wash. 356.

(b) 2 Munf. 266.

Slaughter against Green and others.

1821.
December.



Where wheat is delivered at a mill to be ground, upon an agreement that the miller shall return to the farmer a given quantity of flour for so many bushels of wheat, the miller is a *bailee* and not a *purchaser*; and therefore, if the wheat be consumed by accidental fire, the miller will not be responsible for it. This conclusion will not be altered by an understanding between the parties, that the miller is not bound to return flour made from that identical wheat, but flour of a certain quality made from any wheat in the mill.

This was an appeal from the superior court of law for the county of Culpeper, in which court the appellant brought an action on the case against the appellees, who were the occupiers of a certain mill in the said county, for the value of 120 bushels and 34lbs. of wheat, which he had delivered to them to be ground, and was to receive, in return, one barrel of superfine flour for every five bushels of the said wheat; and he alleges a total failure on the part of the defendants, to perform the agreement on their part. There are several counts in the declaration; but, as the question does not turn on the *form* of the pleadings, it is sufficient to give their substance.

The defendants in the court below filed three pleas, setting forth in effect, that after the delivery of the said wheat, the said mills and wheat were accidentally consumed by fire. To these pleas the plaintiff replied generally.

At the trial, a statement of facts was agreed on by the parties and submitted to the court for its decision on the law arising on the case agreed, in the same manner as if it had been a demurrer to evidence, "and that the judgment shall be rendered according to the very right of the case without regard to the pleadings."

As every circumstance in the case agreed is important, it is deemed proper to give it at full length.

1891.
December.
Slaughter
vs
Green and
others.

Robert Slaughter,
against
John Strother, John W. Green and
Jeremiah Strother.

} Case agreed.

We agree that at and long before the facts herein after stated occurred, the defendants were owners and occupiers of the mills in the county of Culpeper, called the Paoli mills, and were in the habit and practice of delivering into the said mills their crop of wheat raised on the farm attached to the said mills, and of receiving into the said mills from such persons as chose to send it, wheat to be manufactured into flour: that the wheat so delivered by the defendants and the wheat so sent by whomsoever or how many sent, was by means of the machinery of said mills *mixed together*, and flour ground from the *mass so mixed* without regard to the particular wheat sent by any particular person: that out of the flour so ground, each person, so sending wheat to the said mills, was entitled, after allowing a reasonable time for grinding the same, to receive from the defendants in succession and in the order in which they might have delivered wheat, upon his or their demand, at the said mills, one barrel of superfine flour for every five bushels of wheat weighing sixty pounds to the bushel and at that rate for a larger or smaller quantity, and to receive as aforesaid such portion of the said flour as he might choose, loose and not packed in barrels; and for every 100 bushels of wheat, 1000 pounds of bran and 300 pounds of ship-stuff, and at that rate for a larger or smaller quantity; or, if such person chose, he was to give up his claim to the said bran and ship-stuff in consideration of the barrels in which the flour should be packed; which in all cases were to be furnished by the defendants, or otherwise to pay the defendants 42 cents for each barrel so furnished: that it was the general custom of the country, to grind wheat upon the same terms; all which was well known to the plaintiff at and before the delivery into the said mills of the wheat hereinafter mentioned. We

**agree, that before the plaintiff delivered into the said mills
the wheat hereinafter mentioned, various persons, subse-
quent to the 1st day of August 1815, had delivered into
the said mills to be ground as aforesaid 2800 bushels of
wheat, weighing sixty pounds to the bushel, including 260
bushels of wheat raised by the said defendants on the
farm attached to the said mills, which they had put into
the said mills, and all of which 2800 bushels, including
the said 260 bushels, were indiscriminately mixed as afore-
said, and was in the mill at the time the plaintiff delivered
into the mill the wheat hereinafter mentioned. We agree,
that the plaintiff between day of
and the day of 1815, without
any special contract with the defendants, delivered into
the said mills 120 bushels and 29 pounds of wheat weigh-
ing 60 pounds to the bushel, for which the defendants gave
him the receipts, herewith filed, marked 1, 2, 3, 4, and
which are in the words following:**

“ Paoli Mills, 24th October, 1815.

“Received of Robert Slaughter Esq. fifteen bushels
“and fifteen pounds of wheat pr. Joe to grind.

"JOHN STROTHER & Co."

“15 15-60.”

" Paoli Mills, 26th October, 1815.

**“Received of Robert Slaughter fifteen bushels and ten
“pounds of wheat by Joe to be ground.**

"JOHN STROTHER."

“ Paoli Mills, 28th October, 1815.”

“Received of Mr. Robert Slaughter, thirty-nine bush-
“els and fifty-five lbs. wheat by Thomas Vaughn to be
“ground.

"JOHN STROTHER."

"Paoli Mills, 8th December, 1815.

"Received of Mr. Robert Slaughter by Staunton

1921.
December.

Slaughter
vs.
Green and
others.

1821. "Slaughter's Calep fifty bushels and fourteen pounds
December. "wheat to be ground.

Slaughter,
vs.
Green and
others.

"JOHN STROTHER."

And it was the understanding of *both* parties, that the said wheat was delivered to be ground upon the general terms of the said mills and the custom of the country aforesaid, and was to receive his quantity of flour therefor, *without regard to any particular wheat* so delivered into the said mills it might be ground out of, as soon as it came to his turn, and as soon as it could be conveniently ground as aforesaid : that the said wheat so delivered by the plaintiff was the last wheat delivered into the said mills during that season and of the then last crop, except about 70 bushels weighing 60 pounds to the bushel delivered subsequently by another customer of the mill to be ground as aforesaid : that when the said wheat was so delivered by the plaintiff, a greater part of the wheat which had been so previously delivered into the mill, was deposited in one bulk in the third floor of the mill, and the residue thereof, consisting of six or seven hundred bushels, was deposited in the fourth story of the mill : that the said wheat, so delivered by the plaintiff, was elevated by the machinery of the mill into the said fourth story, and mixed with the bulk of wheat aforesaid previously deposited in the fourth story, and that the said bulk of wheat deposited in the fourth story was first ground, and the whole of the flour made from it, delivered to customers of the mill, other than the plaintiff, in satisfaction of their claims upon the mill for flour and which had a priority to the claim of the plaintiff. We agree, that the water in Mountain Run upon which the said mills were built, from the 1st day of August, 1815, to the 15th day of December, 1815, was so low and scarce, that no flour could be made at the said mill during that period ; and that on the said 15th day of December, 1815, the water in the said run became abundant, and from that time until the

said mill was burned as hereinafter mentioned, the usual quantity of flour was regularly ground at the said mills, and at all times during the last mentioned period there were more than 30 barrels of superfine flour in the said mill, packed in barrels and ground in manner aforesaid, out of the wheat delivered as aforesaid into the mill.

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We agree, that a certain Sterne, in September 1815, delivered into the said mill a quantity of wheat of superior quality to be ground as aforesaid, and that John Strother one of the defendants intended to use so much thereof as might be necessary for seeding the crop of the defendants, and offered to *lend* some of the last mentioned wheat to a neighbour for the same purpose, and gave directions to the miller to put the said wheat by itself; but the miller forgot the directions, and mixed it (as was common) with the wheat of others, and thereby disappointed the intentions of the defendants in seeding thereof or loaning out any as aforesaid. We agree that on the 11th day of February 1816, the said mills with all the wheat, flour, bran and ship-stuff therein, were accidentally and without the default of the defendants, consumed by fire, and that at the time of said burning, there was in the said mill of the wheat delivered as aforesaid and flour ground out of the wheat so delivered and bran and ship-stuff the proceeds of such grinding, a sufficient quantity to satisfy all claims for flour, bran and ship-stuff, which any person or persons so having delivered wheat as aforesaid, had against the defendants on that account, and that no flour had been delivered by the defendants to the plaintiff on account of the wheat so by him delivered, except 100 pounds which he received at the said mills on that account; and that the plaintiff, after the burning of the said mills, demanded of the said defendants, at the place where the said mills had stood, 24 barrels of superfine flour, on account of the said wheat so by him delivered; which flour the defendants did not deliver to the plaintiff. We agree, that the receipts herein before mentioned, given by the defendants

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to the plaintiff, were in the usual form of receipts given for wheat delivered at the mill, and were intended to shew that the wheat was received to be ground according to the usage and custom of the mill before stated. We agree, that the law, arising upon the foregoing case agreed, shall be adjudged as if all the facts aforesaid had been proved by the plaintiff, and the foregoing case agreed, was a demurrer to evidence filed by the defendants, and that the judgment shall be rendered according to the very right of the case, without regard to the pleadings. And we agree, that if the law be for the plaintiff, so that he is entitled to recover for the whole amount of the wheat so delivered by him, after crediting the 100 pounds of flour aforesaid, that judgment shall be entered for the plaintiff for \$152 75, with interest thereon from the 11th day of February, 1816. But, if the plaintiff be not entitled as aforesaid, and the defendants be responsible to him for any thing on account of their having put into the said mills 260 bushels of wheat as aforesaid, then we agree that judgment shall be rendered for the plaintiff for \$38 18, with interest from the 11th day of February, 1816. And if the defendants be not responsible as last aforesaid, but be responsible to the plaintiff for any thing, on account of any interest which they might have had in the wheat, flour, bran and ship-stuff so burned, otherwise than on account of the said 260 bushels of wheat, we agree that judgment shall be rendered for the plaintiff for \$38 18, with interest from the 11th day of February, 1816; and if the defendants be responsible to the plaintiff, both on account of the said 260 bushels of wheat and on account of any other interest which they may have had in the said wheat, flour, bran and ship-stuff so burned, we agree that judgment shall be rendered for the plaintiff for \$76 36, with interest from the 11th day of February, 1816. But, if the law upon the whole matter be for the defendants, that then judgment be rendered for the defendants.

RICHARD H. FIELD, plaintiff's attorney.

J. H. WILLIAMS, attorney for defendants.

Upon this agreed case, the court rendered judgment for the defendants; and the plaintiff appealed to this court.

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Leigh, for the appellant.

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W. Hay, junr., for the appellees.*

Judge ROANE, delivered the opinion of the court:

The court is of opinion, that although wheat may be exchanged for flour, as well as sold for money, so as to operate a transmutation of the property in it, from the vendor to the vendee, it may also be the subject of bailment, both for the mere purpose of safe keeping, and for that of being converted into flour, for the use of the bailor. A bailment of this last kind, is called, in the books, *Locatio operis faciendi*, and undeniably exists in the case of a single bailment, and where the flour of the same wheat is to be received in return. But the character of the transaction is not lost, when, for general convenience, the wheat delivered at a mill, by many customers, is agreed by a common usage, or otherwise, to be put into a common stock, and when it is further agreed, that the return is to be made out of the common mass of flour. These variations from the doctrine of a simple and individual bailment, whereby each bailor was to receive the identical proceeds of his own wheat, it was competent for a numerous class of bailors to make, without changing the character of the transaction. It may still be considered as a simple and individual bailment of the wheat, accompanied by an agreement of all the parties, (the bailees themselves not excepted,) that, for general convenience, these conditions should be superadded. They are conditions which impose no hardship on the bailee, but, on the contrary, are inserted for his accommodation and convenience; and in relation to the bailors, it is pro-

* The reporter regrets that he is compelled to omit the argument on this interesting case, as it took place before his appointment.

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bable that, without them, the wheat would not have been received. While the convenience of the bailee is consulted thereby, as aforesaid, it is not seen that any loss or injury will arise to the bailors therefrom. On the contrary, the wheat, deposited by all the other bailors, may have been better, than that of the appellant in the case before us ; and if so, the custom in question would conduce to his benefit. At any rate, the parties to the contract had power to agree to these conditions ; and they do not change the character of the transaction. They do not convert a bailment of the kind mentioned, into a sale or an exchange of the wheat for flour.

By the terms of this custom, this wheat is “ *to be ground* ” into flour, and when so ground, is to be “ *returned* ” to the farmers collectively taken. These circumstances completely negative the idea of a sale or exchange of the wheat, which would carry with it the transmutation of property. The property in the wheat is certainly not conveyed to the millers, when they could not sell the wheat in specie, without violating their contract, which is to grind it into flour ; nor even sell the flour itself without, in like manner, violating their agreement to return it to the several bailors. *That* is a curious kind of ownership, in which the party has no absolute power over the subject, either in its original state, or after it has been manufactured. The millers, in this case, have the absolute ownership of nothing, but the excess of the flour which may remain to them, after returning the stipulated quantity to the several farmers. This constitutes their profit in the contract, and over this portion of the subject, alone, have they the absolute right of property. That right, as to the residue, remains in the farmers, and has never been surrendered by them.

These two circumstances, so utterly incompatible with the idea of a right of property in the millers, in the wheat or flour in controversy, conclude that question, as at the time of the contract. At that time they estopped the ap-

pellees from claiming the wheat, as their wheat. The millers, by their receipts given at the time, even expressly say, that the wheat is received, "*to be ground*;" which excludes the idea of an absolute ownership of the wheat itself. The construction arising out of these receipts, being the act of both the parties to the contract, at the time, outweighs a seeming exposition of the contract, by the appellees only, at a future time, in relation to the wheat of Sterne. They certainly do, when they are combined with the other circumstances.

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This wheat, then, remaining the property of the bailors, and being accidentally burnt by fire, the loss must be borne by them. It must be so borne, because, however it might be under other circumstances, it is expressly found, that there was in the mill, at the time of the fire, flour &c. enough to satisfy all the claims upon the mill, for the same. Thereafter, it was the fault of the appellant, that his portion of it was not demanded, and taken away. He shall, therefore, bear the loss. It is even stronger than the case put in Bacon, vol. 1, p. 554, where it is held, that if A deliver goods to B, (a carrier,) to be carried from C to D, and then forwarded to E, and B carries them to D, and puts them in his warehouse, in which they are destroyed by fire, *before* an opportunity offered to forward them to E, B was adjudged not to be liable. In this case, if the appellant had not neglected to call for the flour, after it was ready, the loss in question would not have happened. We are all, therefore, of opinion, to affirm the judgment.

1821.
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Myers and Son against Friend and Scott.

A treasury note is, by the act of Congress, transferable by delivery and assignment only.

Where a treasury note was assigned by the payee by endorsement in writing to A. B., or order, then transferred by a blank endorsement by A. B., afterwards endorsed in full by C. D., (into whose hands it had regularly come,) to E. F.; this note being afterwards stolen from the mail, and coming by a series of endorsements into the hands of a *bona fide* assignee, may be recovered in an action of detinue brought by C. D., against the holder.

This was an appeal from the Superior Court of Prince George county. In that court, Myers and Son brought an action of detinue against Friend and Scott for a certain treasury note numbered 2562, dated the 11th day of October 1814, and made payable the 11th day of October 1815, being for the sum of \$1000; which note was made payable to James Barbour or order at Washington, and by him endorsed on the back as follows: "Pay to George Rowland or his order, James Barbour." Under this endorsement, there was a blank endorsement by the said Rowland, thus;—"George Rowland." Myers and Son, being regularly possessed of the said note, under the last mentioned endorsement, made the following endorsement under the name of the said Rowland;—"Pay to the Cashier of the Branch of the State Bank of North Carolina at Newbern, or order. Moses Myers and Son." The said note, thus endorsed, was inclosed in a letter by mail to the said Cashier at Newbern; but the mail in which it was conveyed, was robbed; the letter and note taken out; and the note, by means unknown, came to the possession of one Jackson, who transferred the same to Chappell, who transferred it to Parish, who transferred it to James H. Hardaway, a merchant of Brunswick, who received the same in the ordinary course of business and for a valuable consideration without any notice of the loss by the plaintiffs; unless an adver-

tisement inserted in the Petersburg Republican (a newspaper of Petersburg, in which town the defendants reside) and other papers, should be deemed a notice. The note afterwards came regularly to the hands of the defendants. After the institution of this suit, the defendants erased all the endorsements subsequent to the blank endorsement aforesaid by George Rowland, so that only the endorsements of Barbour and Rowland remained on the said note, at the trial; but the endorsement of the plaintiffs to the Cashier aforesaid, though erased, was still legible.

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The jury who tried the cause, found a special verdict, setting forth the facts above stated, and submitting the law arising from them to the decision of the court.

The court pronounced judgment in favor of the defendants, and the plaintiffs appealed to this court.

M. Robinson, for the appellants.

May and *D. Robertson*, for the appellees.*

Judge ROANE, delivered the opinion of the court:

The court is of opinion, that as the treasury note in question is, by the act of Congress, providing for its emission, transferable by delivery and assignment only, it could not have been transferred originally, without such an assignment. A property in it could not have been acquired as against the true owner, by a mere possession thereof, even for a valuable consideration actually paid. This privilege only attaches as against the true owner, in relation to bank notes, or cash notes payable to bearer, or notes endorsed in blank, and which thereby become, in effect, payable to the bearer: and it only attaches in consideration of the cash quality which these papers have, and from their circulating in currency by mere delivery

* The argument in this case must be omitted for the reason assigned in the last case.

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only, and being generally, if not universally, considered, as money. This ground of claim was sanctioned in favor of the *bona fide* holder of such papers, in the case of *Wilson vs. Rucker*.^(a) But, it was also held that it did not extend to include military certificates, which were only considered as mere documents of debt, and not as cash or currency. It did not include them, although it was found by the verdict in that case, that there was a general custom that they could be transferred by delivery only, without assignment. No such custom is found in relation to the note in question; and, therefore, that case is more than an authority for ousting this note from the privilege now claimed. In this respect, this case is much weaker than that of *Wilson and Rucker*; and considered in relation to its original state, the claim of the appellee would be clearly repelled.

The court is also of opinion, that this character of the paper was not changed by the endorsement of Barbour to Rowland, or *his order*: and if a greater negotiability should be held to have been given to it by the blank endorsement of the latter, that negotiability might be again restrained by a special endorsement, and the note thereby brought back to its original state. The endorsement to the Cashier of the Bank at Newbern "or his order," is not different from that of Barbour to Rowland "or his order," which preceded the blank endorsement of the latter, and, as is before said, transferred no property by a mere delivery. The case of *Ancker vs. The Bank of England*; ^(b) shews, that such a restriction may be made; that the negotiability of a bill or note may be stopped or lessened; and that, in case of a special or restricted endorsement, the receiver is bound to read it at his peril, and see that he comes within the authority comprized in it. In the case before us, the appellee should have deduced his title to the note under that cashier to whom it was confided and endorsed. He could acquire no property in it

(a) 1 Call, 500.

(b) Doug. 637.

from another ; from a man who only had the possession of it. He therefore had no right to strike out the last endorsement, but that right appertained to the present appellants ; and by striking out the name of the cashier at Newbern, to whose hands it had never come, and who was to be the mere agent of the appellants, they entitled themselves to bring this action.

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We are therefore of opinion, that the law on this special verdict is for the appellants, and that the judgment of the Superior Court is erroneous and should be reversed, and entered for the appellants.

Lewis against Fullerton.*

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A Slave removing from Virginia to Ohio, with the consent of his master, for a mere transitory purpose, and with the *animus revertendi*, does not thereby acquire a right to freedom in Virginia.

A judgment on a *habeas corpus* in Ohio, in favor of the slave, does not establish his right to freedom.

A deed of emancipation executed in Ohio, but having reference to Virginia, will be void, unless it is recorded according to the laws of Virginia.

Lewis an infant, by Milly his mother, brought suit in *forma pauperis* in Cabell county, against William Fullerton and Jane Rodgers, to establish his freedom. There was a verdict for the defendant, given under instructions by the court, and exceptions filed, which shewed the following case.

In March 1808, Milly the mother of the plaintiff, together with Naise her husband, applied for a writ of *habeas corpus* in Gallia county, Ohio, to be delivered from the

* The reporter is indebted for the report of this case, to the gentleman who argued it. It was argued before the appointment of the present reporter.

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illegal custody of John Rodgers, who claimed them as slaves. The writ was granted; and upon a hearing of parties and witnesses at a subsequent day, the judgment of the court was, that Milly and Naise "go hence, be discharged, and set at liberty."

Edward Tupper a witness proves, that the day after this discharge, Rodgers came to him, and requested him to prevail on Milly to live with him as an indented servant for two years; that, if she would agree to do so, he would execute to her a complete deed of manumission, which should put the question of her liberty at rest; for now, he might possibly reverse the judgment on the *habeas corpus*. Agreeably to this request, the witness obtained the consent of Milly and Naise to indent themselves for two years, on R's first making the deed of manumission, which is spread on the record. The witness examined the deed, before Naise and Milly executed the indenture for two years service.

Bithia Tupper, a witness, heard R. say, he would execute the deed of absolute manumission, if Milly and N. would agree to serve him two years; that, he always intended to emancipate Milly at his death, and had so provided by his will.

The deed of absolute manumission was executed in Gallia county, Ohio, on the 2d April, 1808, John Rodgers styling himself in it, a citizen of Virginia. It is attested by two witnesses. F. Le Clercq, one of them, deposes, that he heard R. acknowledge the execution of the deed, and that it was his voluntary act, and deed, at the time of signing, &c.

Rodgers moreover acknowledged the execution of the deed before Brewster Higley one of the associate judges of Gallia county, which the judge certifies. The recorder of the county certifies the same acknowledgment. The clerk of the county certifies, that this recorder is the actual recorder, and that full faith is due to his certificate; and the President of the Court of Common Pleas of the county certifies, that this clerk is the actual clerk, &c.

On the trial, the admissibility of this deed as evidence was objected to :

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1. Because not certified according to the Act of Congress.

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2. Because, at the time of its execution, Rodgers was a citizen of Virginia, and the deed was not recorded in conformity to the statute of Virginia.

3. If offered as valid under the laws of Ohio, it cannot be received ; for, there is no law of Ohio prescribing the mode of emancipation. The constitution of Ohio, declaring there shall be neither slavery, nor involuntary servitude, is spread upon the record. The court rejected the deed thus offered.

One of the witnesses also proved, that Milly was seen working at a sugar camp in Ohio on a Sunday, while her residence was in Virginia.

On this case, the plaintiff's counsel moved the court to instruct the jury :

1. That, if they believed Rodgers employed Milly to work for him in Ohio, in any business not merely transitory, before the plaintiff's birth, they should find for the plaintiff.

2. That the record on the proceedings in the *habeas corpus* was conclusive of Milly's right to freedom, unless reversed, or shewn to be obtained by fraud or collusion.

3. That it was conclusive of the said right, if the jury should be of opinion it was rendered on the ground of Milly's having been made to work for R. in Ohio ; or of having been sent there in violation of the laws of that state.

4. That, if the jury shall be of opinion that Milly was resident in Ohio, and was taken therefrom by Rodgers by force or violence, they should find for the plaintiff, unless the defendants shewed a right to his services.

The proof of Lewis's birth subsequent to the right of freedom in Milly, in whatever of all these manners, she was entitled to it (if entitled at all,) was clear ; and the

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court refused to give any one of the instructions moved for. There was consequently judgment for the defendant on the verdict, and the plaintiff appealed.

Gilmer, who at the request of the court argued the case for the appellant, took the following points :

Not contending that the discharge of Milly under the *habeas corpus*, was conclusive of her right to freedom, he said, that the fact of her having been so discharged in a state where all involuntary servitude was forbidden, together with the circumstance of Rodgers having treated with her as a free person, was at least presumptive evidence of her right to freedom at the time : That the deed of emancipation executed by Rodgers in Ohio, where there is no slavery, to a person discharged from his custody as free, purporting to confirm such right to freedom, ought to have been received in evidence. It ought to have been received, because its execution is proved by a deposition regularly taken in the cause ; the deposition too of a subscribing witness, the proper testimony in all such contracts. He did not contend, that it was admissible as a certified deed, because the certificates were not in conformity with the Act of Congress : Nor did he insist that it would have been admissible, if executed in Virginia, without strictly complying with the provisions of the statute of the state regulating the mode of emancipation. *Givens vs. Mann*, (a) was a complete authority on this point, he conceded.

His view of the case, he alledged, freed it at once from all these objections, and would not at all violate the spirit of the rigorous statutes on the subject of emancipation. Since Lewis, even if entitled to freedom, was subject to be removed from the state by the act. 1 Rev. Code, p. 437, § 64. And the policy of the act being to prevent the increase of negroes, free or bond within the state, to declare Lewis free, and have him transported, would be

more in obedience to the policy of the statute, than to condemn him as a slave, and suffer him to remain.

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The court, however, will not perhaps be at liberty to go into considerations of state policy, farther than they are forced upon it, by the obvious intent of the act. And he said, that the legislature of Virginia had never declared its will on the subject of emancipation of slaves, whether by citizens or others, in cases in which such emancipation was complete and perfect by what is done between the parties abroad. Such cases can no more be subjected to the control of the local legislation of Virginia by the general principles of law, than any other case of contract. Here is a contract executed in Ohio, and a right is asserted under it in Virginia; the question then arises, whether the contract is to be expounded by the laws of Ohio where it was made, or those of Virginia, whose courts are asked to enforce it. The cases in the English authorities are numerous to shew, that contracts entered into between British subjects in foreign countries, intended to be executed abroad, will be interpreted neither by the law of the country of the domicile of the parties, nor of that whose tribunals are asked to coerce the fulfilment; but that the *lex loci contractus* will govern. On this principle, Indian interest is allowed on contracts entered into and intended to be executed in India. This principle is familiar, and need not to be insisted on. (b) The common law has, in this, adopted the principle of the civil law, *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.* (c) And where no place is specially assigned for the execution of the contract, the place of its date must be intended to be that in which it is to be executed.

In the case before us, the contract was made in Ohio, and if the law of Ohio govern its interpretation, the contract, is valid; for by the laws of that state, all involun-

(b) 1 Bos. and P. 138. 2 Bos. and P. 263. 1 Ba. alr. 381.

(c) 44 Dig. tit. 7. l. 21.

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tary servitude is prohibited, and consequently, no statute was required to give the right, or prescribe the mode of emancipation.

Though it be true, that the *lex loci contractus* will govern the interpretation of contracts, it is equally so, that a contract made in one place, but by express stipulation to be executed in another specified place, must be controlled by the laws of the latter, as is shewn by the passage quoted from the civil law. But it will be observed, that the deed of emancipation was complete and perfect on its execution: it had nothing farther in prospect; and consequently the indenture for two year's service, which was the consideration in part on which the deed of emancipation was executed, cannot control this last mentioned deed, so as to make it also have relation to Virginia, as the place of its execution: it can no more control it, than an agreement to pay a sum of money in Virginia in consideration of the manumission would make such deed have reference to the laws of Virginia as the place of its execution. In this case, the consideration is already passed. To give such an interpretation, would in this case convert the deed of emancipation into a naked instrument of fraud by Rodgers; a mere device for decoying into Virginia a person, who in Ohio had been declared to be free, and with whom he treated as a free person. The deed of emancipation, too, was a valid deed between the parties without any consideration at all: Rodgers and all claiming under him are estopped from denying its validity; much more, then, ought he be prevented from setting up his own fraud to vitiate his own act, done freely and voluntarily.

To say, that a deed made abroad under such circumstances is void, is to assert, that no native Virginian can, in any country on earth, emancipate a slave in such country, so as to entitle him to freedom in Virginia; except by a literal compliance with the statute of Virginia: which would be contrary to every general principle of law; and there is nothing in the statute on this subject to distin-

guish it from other cases. The deed then ought to have been admitted as a contract, or voluntary gift, on the proof of its execution, as any other contract would have been; and being admitted, it is conclusive against Rodgers and all claiming under him: the judgment ought then for this reason to be reversed. He declined to press the other points, thinking this the principal question on the merits.

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Judge ROANE, delivered the opinion of the court:

The court is of opinion, that there is no error in the opinions of the Superior Court, impeached by the 2d and 3d exceptions. The reasons in support of those opinions, are so clear and self-evident, that they need not be adverted to.

Nor is there any error in the other opinions of that court, objected to by the appellant, and which go to the merits of his title.

The appellant claims his right to freedom, on three grounds: 1st, on the right to freedom alleged to have been acquired by his mother, prior to his birth, by having sojourned within the state of Ohio, and as is further alleged, been there employed by her master: 2dly, on the ground that her right to freedom was, prior to his birth, established by the judgment on the writ of *habeas corpus* stated in the record;—and 3dly, he claims it under the deed of emancipation contained in the proceedings; and which was also executed prior to the birth of the appellant. It is readily conceded, that if his mother's right to freedom was valid and complete, prior to his birth, on any of these grounds, his right to freedom follows as a necessary consequence.

Under the first enquiry, we must throw entirely out of view the *subsequent* residence of the mother within the state of Ohio, with the alleged consent of Rodgers her former master. Whatever may be the effect of a residence therein, for a great length of time, and with the assent

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aforesaid ; whatever may be the effect of this circumstance in relation to a person who may thereby have become one of the permanent members of that state, the residence now in question is of a far different character.

There is no evidence in this case of the mother's residence within the state of Ohio, prior to the appellant's birth, but that she was once seen, on a Sunday, working at a sugar camp therein, in the absence of her master, and without any evidence that it was with his permission. In reference to this evidence, the court below was asked to instruct the jury, that if they should find that she was employed by her master within that state, in making sugar, or any other local service, not merely transitory, and for however short a time, they must find a verdict for the plaintiff. The judgment of the superior court refusing to give that instruction was, in our opinion, entirely correct. Such an occupation for a short time, and even for the benefit of the master, and probably in his presence, could never operate an emancipation of his slave. It could not so operate, when the *animus revertendi* strongly existed in him, both in relation to himself, and to his slave. There is indeed but a shade of difference between such a residence as this, (if indeed it can be called a residence,) and the mere right of passage through the state : and such a construction, as that now contended for, would whittle down to nothing the right of the citizens of each state, within every other state guaranteed to them by the constitution. Such an occupation cannot be said to carry with it evidence of the assent of the master, that she should cease to remain his property, and become a member of the state of Ohio, without which the regulations of that state on the subject of emancipation cannot attach.

As for the 2d ground of claim, under the judgment upon the *habeas corpus*, it has been truly answered, that that judgment has not *affirmed* the mother's right to freedom. Even if it had, and this mode of proceeding was legalized by the laws of that state, (as it *seems* not to be by

the laws of this,) in favour of a slave against his master, those laws are not found in the case before us : and even if they were, it might well be questioned whether the judgment aforesaid could have concluded the right of the master in the present instance. The right of our citizens under the constitution to reclaim their fugitive slaves from other states, would be nearly a nullity, if that claim was permitted to be intercepted by a proceeding like the one in question ; a proceeding of so extremely summary a character, that it affords no fair opportunity to a master deliberately to support his right of property in his slave. Such a proceeding ought not, therefore, to be conclusive on the subject.

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As to the deed of emancipation contained in the record, that deed, taken in connexion with the evidence offered to support it, shews, that it had a reference to the state of Virginia. It is stated to have been made by John Rodgers a resident of the state of Virginia ; and the testimony shews, that it formed a part of a contract whereby the slave Milly was to be brought back, (as she was brought back,) into the state of Virginia. Her object, therefore, was to secure her freedom by the deed, within the state of Virginia, after the time should have expired, for which she indented herself, and when she should be found abiding within the state of Virginia.

If then this contract had an eye to the state of Virginia for its operation and effect, the *lex loci* ceases to operate. In that case it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws, to effectuate an emancipation, for want of a due recording in the county court, as was decided in the case of *Givens vs. Mann* in this court. It is also ineffectual, within the commonwealth of Virginia, for another reason. The *lex loci* is also to be taken subject to the exception, that it is not to be enforced in another country, when it violates some moral duty, or the policy of that country, or is inconsistent with a positive right secured to a third person

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or party by the laws of that country, in which it is sought to be enforced. In such a case we are told "*magis jus nostrum, quam jus alienum servemus.*"(d) That third party, in this case, is the commonwealth of Virginia : and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance. For want of being emancipated agreeably to the provisions of our act on that subject, the duty of supporting the old and infirm slaves would devolve upon the commonwealth. That burthen is only to be borne by the master, in relation to slaves "*so emancipated ;*" that is, emancipated agreeably to the provisions of the act. 1 Rev. Code, p. 434. Even yet, and notwithstanding a late alteration of the law upon this subject, that burthen must be borne by the commonwealth, at least for a time.

For these reasons, we are unanimously of opinion to affirm the judgment.

(d) Hub. 2 tom. lib. 1, tit. 3. 2 Fomb. 444.

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When an action is brought on a note, which was executed at the time when 5 per centum was the legal rate of interest, upon which the defendant acknowledged the action for the principal *with interest* from the date of the note; on which acknowledgment a judgment was rendered for the principal, with interest *at the rate of six per centum per annum*; this is not a mere clerical error, but one which can only be rectified by an appellate court.

The proper construction of the 108th section of the act of jeofails. 1 Rev. Code, 512.

Patten and May brought an action of debt in the Superior Court of law of Frederick county, against Bent, on a note executed by the latter to the former, for \$ 284, with interest till paid. The note was dated, June 21st 1796; at which time the legal rate of interest was only 5 per cent. On the 7th day of October, 1819, the defendant (Bent) appeared and acknowledged the plaintiffs' action against him, for the sum of \$ 284 with interest thereon from the 21st of June, 1796, until payment and the costs. The record proceeds to state " Therefore it " is considered by the court that the plaintiffs recover " against the said defendant the said sum of \$ 284 with " interest thereon to be computed after the rate of six " per centum per annum from the said 21st day of June, " 1796, and their costs by them about their suit in this be- " half expended; and the defendant in mercy, &c."

Bent appealed to this court, assigning as error, that a higher rate of interest was allowed by the judgment, than the law authorised at the time the note was executed.

Gilmer, for the appellant.

That there was error in entering the judgment for six *per cent.* on a contract made at a time when by law all contracts bore only 5 per cent. interest, must be admitted by all. The only question to be considered is, whether

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such error is merely clerical, and therefore capable of correction by motion, or by writ of error *coram vobis*; or whether it is a judicial error, which can be corrected only by appeal.

The distinction between judicial and clerical errors be supposed to be, that the latter were mistakes capable of correction by a simple reference to some other part of the proceedings, as misrecital of sums, miscalculation, &c. Judicial errors, on the other hand, consist in the improper application of the law on admitted facts. In this case, there was nothing in the record by which the clerk could safely correct the judgment. The note on its face only purported to bear interest; it did not fix the rate: reference to it, therefore, could not decide the question, whether the rate was 5 or 6 *per cent.* It was then not a clerical error; for, there was nothing in the papers by which it could be controlled and corrected.

It required a decision of the question, which law was to govern the contract, that existing when it was made, or that enacted after its execution. This is a pure question of law. The judgment being on confession does not alter the case. That confession says "with interest," which must be intended "legal interest;" what was *legal interest* then, recurs upon us, and that, was a question of law. There was then error in law in the decision below, and an appeal was the proper method for correcting it.

Tucker, for the appellee.

The error complained of in this case, was merely clerical. The defendant came in person, and acknowledged judgment for the debt with interest from June 1796. On this confession, it was the duty of the clerk to enter the judgment for interest at the rate allowed in 1796. The error is, therefore, his, and not that of the court, which when there is a *cognovit actionem*, is not called on to ex-

ercise its judgment. This is what is meant by judge Pendleton in *Gordon and Frazier*.^(a) That case is much stronger than this. Here the judgment being confessed with interest from a particular date, the act of Assembly furnished the rule by which the judgment was to be entered up. But in *Gordon and Frazier*, there was something more judicial in the matter : for, the error assigned was in not noticing the memorandum on the penal bill, and it was questioned by counsel in this court whether it ought to have been noticed or not.

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If then this error be merely clerical, it could have been corrected in the Superior Court by motion or writ of error *coram nobis*.^(b) It is an error in fact, which cannot be corrected by writ of error before a superior tribunal, or by a supersedeas which is but a substitute for it.

It would indeed be oppressive, if the defendant, instead of correcting the error by motion below, should burden the appellee with the costs of an appeal here.

But there is no longer room to doubt of this matter. The act of assembly, 1 Rev. Code 1819, page 512, provides "that where there is a mistake in a sum and any thing to correct by, the court or judge in vacation shall amend upon notice to the opposite party." So, that this mistake in the amount of interest, might have been amended on Bent's motion, either in the court below or by order of the judge. This law was made to prevent vexatious appeals for trivial errors, which might be corrected without difficulty.

But, if these points be against me, I offer for the appellee to release the excess under the provisions of the law, 1 Rev. Code 513, § 110, and ask such judgment as ought to have been given in the court below. In that event too, the appellee should have his costs : for, otherwise, that section of the act of assembly will be inoperative ; since this court always could correct the errors of the courts below,

(a) 2 Wash. 135.

(b) 2 Wash. 130.

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by rendering such judgment in cases of this kind, as they ought to have rendered. Besides, as the appellant might have been relieved otherwise, we ought not to be taxed with the costs of this proceeding. Thus, this court refused the plaintiff in the writ of error *coram nobis*, his costs, because he did not pursue the less expensive course of a motion.(c)

As to the other errors, they are cured by the confession of judgment.

Gilmer, replied.

In the case of *Gordon vs. Frazier*, there was where-withal safely to correct upon the paper on which the action was brought. It was part of the agreement, that the tobacco should be of a particular inspection; the clerk in entering the judgment should surely have followed the agreement. Here he has not followed it, for it was in effect for 5 *p. cent.*, though not so expressed; and there is nothing on the note to shew whether it was to be entered for 5 or 6 *per cent.*

The statute relied on, cannot mend the appellee's case. The 108 §, page 512, applies only to "mistakes, miscalculations and misrecitals, of sums of money &c.," which can safely be corrected by other papers in the cause. There is here neither mistake, miscalculation, nor misrecital of the sum due: but a mistake in the law which shall govern the contract: neither is there any paper by which the error can be safely corrected.

The 109 § applies only to particular bonds taken by sheriffs in distress for rent &c. and as to the release of the excess proffered under the 110 §, that section is by express reference confined to the cases mentioned in the preceding section, which is shewn to have no application to this case.

The error is in the court then, and the statute has provided no means of correcting it but by appeal: the judgment must be reversed.

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Judge COALTER. This is a suit on a note executed a short time before the passage of the act changing the rate of interest from 5 to 6 per cent. The defendant confessed judgment for the debt and interest, without stating the rate, and the clerk, by mistake, in entering the judgment, gave interest at the rate of 6 per cent. A supersedeas was awarded by a judge of this court, since the late act of assembly authorising amendments of judgments, by application to the court below, at a subsequent term, or to the judge in vacation. Two questions therefore arise :

1. Whether this is a *mere clerical mistake*, at all times amendable on motion before the court where the judgment was entered, and consequently perhaps, not a case proper for this court.

2. Whether, if it is not such a clerical error, it is nevertheless such an error as might and ought to be amended, under the late act of assembly.

I think it is a clerical error, and was always amendable in the court below, on motion.

In the case of *Gordon vs. Frazier*, (d) the suit was on a tobacco bond, on which credits were endorsed, and on which also there was a memorandum signed by the obligee, agreeing to receive tobacco of another inspection than those mentioned in the body of the bond. When the cause was called for trial, the plea was withdrawn, and judgment entered by *nil dicit*, without either giving the proper credits, or noticing the other endorsements mentioned on the back of the bond. This was considered a clerical error as to *both omissions*, amendable on motion.

The act authorising judgments to be entered for the principal sum due, with interest thereon, says nothing

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about credits ; yet under the equity of that statute, it has always been the practice and duty of the clerk to enter the credits ; and so I presume it was considered his duty, in this case, to notice the endorsement relative to the other inspection, though that was a question of law of more doubt than the present, as it appears that the district court itself erred as to it on the writ of error *coram nobis*, which was brought in that court to correct those errors. If it was the duty of the clerk under a sound construction of the act, to notice those things on entering the judgment in that case, it would seem to me to be, *a fortiori*, his duty to notice the proper rate of interest in this case, the law expressly saying, that the judgment shall be entered for the principal sum due *with the interest*. I presume, that neither in that nor in this case, there would have been any doubt as to the nature of the error, and the power of the court to correct on motion, had they both been office judgments ; but it was contended there, as it is here, that the error was in the *judgment of the court*. To this the president of the court answers : “ In form it “ is so, and though the proceedings, as drawn up by the “ clerk, are read over in court, and where there has been “ a trial, the same are then corrected, yet this is not done “ when a *judgment is confessed*, as it was here, for in such “ case the act of assembly furnishes the rule by which the “ clerk is to enter up his judgment.”

“ There is no doubt but the court may amend, upon “ motion, where a mistake is committed by their clerk, if “ there be, as in this case there was, something to amend “ by.” The thing to amend by there, was the bond with its endorsements : the thing here, is the note bearing date before the change of the rate of interest.

If this was sufficient to amend by, in case of an office judgment, I cannot see why it shall not be equally proper to amend by, after confession of judgment, if that is no more the judgment of the court, as I understand to be clearly decided by the above case, than an office judgment.

The case of *Brooke vs. Roane*, (c) does not, in my opinion, overrule the above case. That was a motion on a delivery bond taken a year after the change of the rate of interest. The case is very shortly reported ; but I collect from it, that the execution was on a judgment bearing 5 *per cent.*, but that in consequence of the delivery bond being taken after the change, and being in the nature of a new judgment, the district court thought it ought to bear *six per cent.* Whether there was a bill of exceptions stating this point, does not appear from the report ; but be this as it may, there must have been a trial and an inspection of the bond and execution by the court, even if the defendant did not appear to make defence. This court reversed the judgment, and entered it for 5 *per cent.*, “ considering the bond not as a new contract (in which “ the concurrence of both parties is necessary, but as a “ measure legally imposed on the creditor in pursuit of “ his execution on his former judgment, which bore an interest of 5 *per cent.* only.”)*

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But suppose this a case of mere clerical error, amendable elsewhere, what ought to be done with it here, should the appellee not be considered as entitled to the benefit of the late act of assembly ?

We cannot affirm the judgment as it now stands ; because that would preclude an amendment below. If we reverse, then we take jurisdiction of a case in which the party had remedy elsewhere, in the nature of an original remedy, and I would assimilate it to a case of an application to this court to quash an execution for irregularity, not preceded by a motion for that purpose in the court below ; and I should therefore incline to think, that the correct course would be, to dismiss the supersedeas as improvidently awarded.

(c) 1 Call, 205.

* On examination of the record in this case, I find the defendant appeared by attorney ; of course there was a defence, and the execution on which the delivery bond was taken, was for a debt bearing 5 *per cent.* interest ; so, that the future rate of interest was clearly before the court.

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This difficulty, perhaps, may be obviated by the provisions of the late act of assembly. That act, I consider, extends as well to previous, as subsequent judgments.

In cases of clerical errors, it gave no new remedy by motion in court; but it gave a remedy by motion to the judge in vacation, and in either case makes such amendment so far a part of the original judgment, as that, by being certified to this court, on *certiorari*, we can affirm such amended judgment; thereby giving damages and costs against the party, who has thus improperly resorted to this tribunal.

It may be said, however, that the appellee here has not brought himself within the provisions of this act by having procured such amendment, and applying for a *certiorari*.

I consider, however, that this act is not only remedial, but highly beneficial, and ought to be applied, *according to its spirit*, wherever it can: and as this is the first case arising under it, and as a supersedeas was awarded by a judge of this court, which may have been the first notice the party had of this alleged error, I would excuse him for not applying, in the first instance, to the court or judge below, who might perhaps have felt a delicacy in proceeding, as a supersedeas had been awarded by a judge of this court: a very prudent delicacy indeed, if there is any doubt of the propriety of my opinion. I should, therefore, after intimating my opinion that it could be so corrected, give him time, before a final decision, to make that application.

2. But if I am wrong in believing this to be a mere clerical error, does not the act in question extend to errors not merely clerical?

Suppose the case before us was not that of *Bent vs. Patten*, but of *Gordon vs. Frazier, &c.*; that it had been a judgment since the act, and not by confession, but after a verdict; and that the clerk, in entering the judgment, had been guilty of the same omissions which took place in

that case ; this would not be a clerical error, *being after a trial* ; but it would be clearly an oversight or mistake, both by the clerk and the court, and there being among the papers a bond by which this mistake could be *safely* amended, the case would be within the provisions of this act, and I would give the party time, as above suggested, to avail himself of it. But, if I have succeeded in shewing that the note in this case is a paper in the record by which an *office judgment* could be *safely* corrected, even if I have failed in shewing it is a clerical error ; but admitting that the case of *Gordon vs. Frazier* has been overruled as to that point, yet if that case could now be corrected, after verdict, I cannot perceive, under a *liberal construction* of the act, if not under its *very words*, this may not. It is true, that the act, in reciting the mistakes occurring in the courts, speaks of those arising from “ miscalculation “ or misrecital of any sum or sums of money, tobacco, “ wheat, or other such thing, or of any name or names ;” yet the very use of the words “ *or other such thing*,” shews, that every mistake was not intended to be set out ; and even if those words were not there, it is not necessary for me to refer to that numerous class of adjudications which extend remedial statutes to such cases as are equally within the mischief. We all know, that mistakes of this kind do occur ; and the delays of justice, and costs attending their correction in the appellate courts, are mischiefs which have been long felt. It is therefore provided, that “ if there shall be among the record of the proceedings “ in the suit, in which such judgment or decree shall be “ rendered, any verdict, bond, bill, note, or other writing “ of *the like nature or kind*, whereby such judgment or “ decree may be *safely* amended,” it shall be amended, &c. Here is a mistake, and here is a note by which it could be safely amended, had it been an office judgment. It may be said, that under this act it is not a mistake in a sum of money ; but it is one in the *rate of interest*, and that is surely a mistake very much of the like kind. But

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suppose there had been credits endorsed on this note, and the clerk, as is the correct course, as decided in this court, (*f*) had calculated interest at 6 instead of 5 per cent. and had taken the credits from the principal and interest, and had thus shewn a sum due, at the last payment, which we will say was made since the six per cent. law, and had entered judgment for that balance, with *legal interest* from that time, without stating the rate; this, on an execution would, of course, justify the sheriff in demanding six per cent. Here would be a *miscalculation*, I suppose, coming within the *very words* of the statute, and might be corrected *as to that*; and if so, might it not be corrected also as to the rate of interest? Suppose this very case had been corrected by the judge, and after such correction the appellee had brought it here, would we reverse because the judge had no right to amend either in court or out of it? If we did, what judgment would we enter? Precisely the amended judgment, so as to restore the case to the situation it was in when the party appealed, and shewing he was not injured thereby. The note would be sufficient for us to enter such judgment by, as the court below ought to have entered; but not to authorize that court to correct by.

This court surely ought not to be burthened with the correction of such cases as this, contrary, in my opinion, to the plain intention of the law, especially when it has been solemnly decided that even errors in cases collaterally affecting the freehold and franchise were not considered by the legislature of sufficient importance to interfere with our great and legitimate duties.

Judges CABELL, BROOKE and ROANE, concurred in the following opinion, which was delivered by judge ROANE, as the opinion of the court:

This is an action of debt on a note, brought in the Superior Court, by the appellees against the appellant.

The declaration states that the note was made on the 21st of June, 1796, at Alexandria, within the county of Frederick, by which the appellant promised to pay on demand the sum of \$ 284. The note is copied into the record, and also has several credits endorsed on it. Issue was joined on the plea of *nil debet*. Afterwards, the defendant came into court in his proper person, and acknowledged the plaintiff's action for \$ 284, with interest from the 21st of June, 1796; on which acknowledgment a judgment was rendered for \$ 284, with interest, at the rate of 6 per centum per annum, from the 21st of June, 1796, till paid. The confession, on which this judgment was founded, left no fact to be decided on as to the amount of the debt acknowledged, and no computation or calculation to be made by the clerk. It specified \$ 284 as the principal sum for which the judgment was to be rendered, and with regard to the interest, it did not agree that an interest of 6 per cent. was to be allowed, but only that interest was to be computed on the said sum; that is, as we understand it, the interest which is allowed by law. What interest is allowable upon any contract, is always a question of law; and it is sometimes an intricate question, as it respects the time, or the place of the contract. In this case it was undoubtedly a question of law, as both the acknowledgment of the appellant and the declaration referred to by it, shewed that the contract arose on the 21st of June, 1796; after which time, the rate of interest was altered by a general law, from 5 to 6 per centum per annum. When, therefore, the question of interest was submitted in the general terms stated in the confession, that confession combined with the intermediate alteration of the law as aforesaid, submitted, in effect, to the court, the question of interest, as it were by a special verdict. It was submitted to be decided, whether the law of the time of the contract, or that of the date of the judgment, in relation to the rate of the interest, was to govern; or in other words, whether an interest of 5 or 6 per cent. per annum

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was to be allowed. The court decided in favor of the latter, and we are all of opinion that that decision was erroneous. If this question thus decided, be a *legal* question, and as such, proper for the decision of the court, rather than of its subordinate officer the clerk, it is not the less submitted to it by the general acknowledgment now before us, than if it had in so many words stated that it was submitted *to the court* to be by it decided. It stands so submitted under the principle *ad questiones legis respondent judices*. This maxim supplies the place of a *special reference to the court* in this particular. This question of law was, therefore, referred to the court, and was decided on by the court, and if so, the case of *Gordon vs. Frazier and Cosby*, tells us that it could only be corrected by a superior tribunal. Independent of the terms of the judgment before us, whereby it is *considered* that an interest of 6 per centum per annum is to be paid, that question was surely decided on by the court which alone was submitted to it, and as to which the materials for a just decision were furnished by the declaration referred to, and by the confession. That question was not decided on by the clerk, which was not submitted to his judgment, and which involved a *legal* enquiry proper for the adjudication of the court. Those only are clerical errors which are made by the clerk, which depend only upon a comparison and calculation to be made by him, and may be safely reformed by reference to other statements contained in the proceedings. That was the case, in *Gordon vs. Frazier and Cosby*, even in relation to the endorsements as to the Hobbshole tobacco. In the case before us, there is no other part of the record to which you can refer, as in that case, to reduce the interest in question from 6 per cent. to 5. You can only so reduce it, by referring to the principles of law, in relation to the time of the contract.

The case of *Brooke vs. Roane, (g)* is, in principle, decisive of the case before us. In that case, judgment was

rendered on a forthcoming bond taken after the date of the act changing the interest, upon a contract existing *before*, and the judgment was for an interest of 6 per cent. In that case, though rendered upon notice, the court had as little to do with specifying the rate of the interest, as in the case before us. In both cases it was intrusted to the clerk: yet in that case, this was held to be the act of the court, and was corrected *here*, upon an appeal. It was so corrected on the ground that the forthcoming bond made no new contract, and that, consequently, the former rate of interest should prevail. On the same ground, this court should now hold that the error in question was the error of the court: that this court has consequently the power to correct, and that the court below having erred in relation to the law of interest, its judgment ought to be reversed. This is a *fortiori* the case, in the present instance, in which the question of interest is submitted to the court, as we have endeavoured to shew, as it were by a special verdict.

In construing the 108th section of the act of *Jegfalls*, (h) in relation to the case before us, we can never forget the great land mark before mentioned, that as to questions of law, the courts are to decide them. This principle, standing alone, would go far to restrict the words "mistake, miscalculation or misrecital" therein contained, to the standard before mentioned. But it does not stand alone. By the same section, a reference is made to *other parts of the record* by which these mistakes may be safely amended. These last circumstances, coming in aid of the principle aforesaid, turn the scale against the construction contended for by the appellees, in the present instance. There is no other part of this record which contains any statement of fact, by which the amendment in question can safely be made. If a correction is to be made, it can only be made by one judicial tribunal acting upon the mistaken judgment of another. Although the correction is to be

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made, under this section, by the same judge *in vacation*, it is only as to such corrections as can be safely made by him, by referring to other statements in the record. It was never intended to make him an appellate court over himself. It was never intended that his decisions made in open court, and upon argument, should be reversed by himself, at his own chambers, in vacation. *Quoad* questions of law at least, the revising courts should have at least as many lights as those courts whose judgments are to be considered.

This construction of that section is confirmed by the section immediately following. By that section (109th) the judgments are to be corrected in two classes of cases only, and those are only where, by a mere comparison of different parts of the record, the corrections can be safely made. One of these is by pruning down the sum found by the verdict, to the standard of that demanded by the declaration. The ideas we have stated in relation to the 108th section are thus confirmed and acted upon in the 109th. They are all to be taken in exclusion of those mistakes which, in their nature, are purely legal, and which therefore must go for correction to an appellate court.

As for the right to release a part of the judgment in *this* court, claimed under the 110th section, *that* is restricted to the two classes of cases embraced by the 109th section. It is so restricted by the terms "such judgment" therein used. It does not give the appellee a right to release the illegal one per cent. in this case in the appellate court.

The judgment must be, therefore, reversed with costs, and entered for five per cent. instead of six.

Shobe against Bell.

1892.
January.

Where a juror, after he is sworn in an action of slander, expresses a wish to withdraw, because he himself had a similar suit depending in the same court, in which the slander was the same ; but the counsel not consenting to withdraw him, the trial proceeds and a verdict is rendered ; the court ought not to grant a new trial.

This was an appeal from the superior court of law for Shenandoah county. Bell brought an action of slander in that court, against Shobe. The jury found a verdict for the plaintiff, and assessed his damages at \$ 450. After the verdict, the counsel for the defendant moved the court for a new trial on four grounds : 1. Because the verdict was contrary to evidence. 2. Because the damages were excessive. 3. Because Watson was an improper juror. 4. Because the jury divided by 12, and three of them yielded their verdict from an improper influence. The court rejected the motion and entered judgment for the plaintiff. A bill of exceptions was filed setting forth the facts at large on which the motion was founded, and an appeal taken to this court.

As the two first grounds for a new trial above stated depend entirely upon evidence, it is unnecessary to state the facts in this place. The only questions of law are presented by the two last exceptions.

In relation to the admission of Watson the juror, it is stated in the bill of exceptions, that " after the jury were " sworn, one of the jurors named Watson, when he heard " the charge of slander read, observed that he was placed " in a delicate situation, because he had a suit of slander " depending in this superior court wherein he was plaintiff, " and the charge of slander was the *same* ; but the *plaintiff's* " counsel not consenting to withdraw him, the trial went " on." On the last objection it is stated that, " it appeared " by the affidavits of four of the jury that it was proposed

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“ in the jury room that each man should put down a sum,
“ add up the whole and divide by 12. They did so, and
“ the sum came out \$487. This sum they did not agree to,
“ and the plan of dividing by 12 was abandoned. Nine
“ of the jury, after some consultation, agreed on \$450 ;
“ the other three thought the sum too high, and one of
“ them said, if it had been left to him alone, he would only
“ have given from \$30 to \$50 ; but finding a large major-
“ rity against them, and despairing of getting the verdict
“ lower, or as they wished, and that they would be de-
“ tained on the jury until all agreed, yielded to the opin-
“ ion of the majority, and assented to bring the verdict for
“ \$ 450.”

Tucker, for the appellant,

Gilmer, for the appellee.

The counsel for the appellant relied on two points.
1. That Watson was an improper juror. 2. That the
verdict rendered was not the verdict of the whole jury,
but of a part only.

As to the first point. If the objection to Watson had
been known before he was sworn, he would have been set
aside ; for, though a juror is not related to either party nor
has shewn any marks of partiality, yet if there be suffi-
cient reason to suspect that he *may* be more favourable to
one side than the other, he ought not to be impannelled.
(a) That Watson's situation rendered him an improper
juror, is manifest. Where from *any* cause, a juror leans
in favor of one party on *any* point in the case, he is an
unfit juror. Now, in a case for words, one of the most
material points is the *quantum* of damages ; and Watson
would naturally incline to extend to the utmost limit the
damages of the plaintiff Bell. He himself felt the influ-

ence of these considerations, and even objected to himself. The Plaintiff's counsel refused to permit him to be withdrawn; a strong evidence of his conviction of the operation of these motives on Watson's mind. To test the principle, let us suppose *the whole twelve* had been in Watson's situation. Could it have been reasonably expected that Shobe would have had justice?

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In actions of this sort, a scrupulous attention to the impartiality of the jury is peculiarly necessary. The jury are the proper judges of the damages, and the court will rarely interfere for excess of damages. It is therefore all important, that the jury which is invested with such high power should be above all suspicion of partiality or excitement. In causes of another description, some standard or measure is furnished by which to judge whether they are right or wrong. Here there is no standard. New trials ought in such cases to be more freely indulged, because they can do the plaintiff no harm and may contribute to justice. In 1 Strange, 672, the court assigned as their only reason for granting a new trial that "it was fit the defendant should try another jury, before he should be finally charged with such heavy damages." The evidence did not maintain the charge, and the damages were disproportionate to the offence. But the jury, not being "above all suspicion," inclined to the worst interpretation.

2. The verdict is not the verdict of the whole jury, but of part only. This is in fact clearly proved by the testimony of four of the jury. They first formed an aggregate of the different sums and then divided by 12. This gave \$487. They then fixed on \$450, either for round numbers or to veil the transaction. This is a mockery of justice.

But the verdict was rendered by three of the jurors, under an impression that they must yield to the majority, one of them having been only for \$30 or \$50, and yet rendering the verdict for \$450. Here was no assent of

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the mind. The cases in 1 Term Rep. 11, and 1 Wash. 76, may be cited. But the latter case is in our favor; for, there a new trial was granted, even in chancery. Here there is no tampering with the jury. The information was received when the jury returned with the verdict. In *Cochran vs. Street*, there had been time for tampering. So where a motion for a new trial is made in England in Westminster Hall, time for tampering is afforded between the trial and the term which follows it. Here there was none, and no reasonable objection can be offered to the juror's affidavit.

For the appellee it was said, that it was no disqualification of Watson that he had an action of slander pending, unless it had been with one of the parties in this suit. The doctrine as laid down in Co. Litt.(b) is, that if a juror has a part of the land depending on the same title with the land in controversy, it will be a good cause of challenge; but surely not that he has an action in ejectment with other parties. It is also said in Co. Litt.(c) that no challenge can be received after a juror is sworn, except for matter arising after he is sworn; not for matter, only discovered afterwards. The candid manner in which he disclosed his situation, proves him to have been upright and conscientious.

As to the objection that the jury divided by 12, it is expressly disproved that they did so divide. Besides, in actions like the present, where no certain standard exists for fixing the damages, it would be difficult for juries ever to agree, unless they adopted some such principle of accommodation. As to the danger which seems to be apprehended as resulting from this mode of decision, it ought not to be anticipated that men of good character, and without interest, would resort to such unworthy arts to carry a point of mere opinion, by which they are not to derive any benefit. But, as they rejected this mode of de-

cision, and finally agreed on a less sum, it is plain that they consulted their ideas of propriety, and rendered a verdict as nearly satisfactory to all, as can ever be attained in a case of this sort. With regard to the motive which, it is said, influenced three of the jurors, it would be highly dangerous to enter into such a nice scrutiny of the *motives* of jurors, when they do not amount to gross mistakes of law, or breach of duty. It is highly improper to meddle with verdicts on such grounds, and Lord Mansfield refused to hear evidence of it in *Vaise vs. Delaval* (d) The case of *Cochran vs. Street*, was an actual mistake of four jurors, who thought the opinion of the majority absolutely imperative on them. In *Price's ex. vs. Warren* (e) a new trial was refused on the affidavit of two jurors that the verdict was rendered on the statement of one of the jury, not upon oath, because it was deemed dangerous to meddle with verdicts.

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Tucker, replied.

BY THE COURT. The judgment of the superior court is affirmed.

(d) 1 Term Rep. 11. (e) 1 H. & M. 385.

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Edmonds against Green.

A confession of judgment on a motion on a forthcoming bond, will operate as a release of errors in the original judgment.

Therefore, where an office judgment is erroneously entered up against the principal and *special* bail; the latter afterwards gives a forthcoming bond, and confesses judgment on the said bond, he cannot avail himself of the error in the original judgment.

James Green brought two actions of debt against James Edmonds and John Edmonds, on single bills, in the superior court of Fauquier county. William Edmonds; the appellant, became their appearance bail. At a succeeding court, the appellant entered himself special bail. The defendants failing to appear, an office judgment was confirmed against them and "William Edmonds security for their appearance." A *feri facias* issued against the defendants and "William Edmonds jun. their *appearance bail*." Upon service of the execution, the defendants together with the appellant gave a forthcoming bond. The bond being forfeited, a motion was made against all the obligors, who gave a judgment *by consent*. William Edmonds the appellant (who had become special bail, but against whom a judgment had been erroneously entered as *appearance bail*) then applied for, and obtained, a supersedeas, from a judge of this court, on the *original* judgment.

Briggs, for the appellant, contended, that the original judgment was clearly erroneous, in being entered against the *special* bail; and the only question was, whether the confession of judgment on the forthcoming bond, operated as a release of errors in the original judgment. He contended, that it would not; because although the forthcoming bond is to some intents *dependent* on the *original* suit, yet it is not a *part* of that suit. The act of assembly (a) there-

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fore is fully satisfied in confining the release of errors, to the judgment on the forthcoming bond. The appellant had no opportunity on the motion on the forthcoming bond, to avail himself of the errors in the *original* judgment. If he had attempted it, his attempt would have been fruitless. Why then should his confession of judgment be construed into a release of errors, to which he could not have excepted, in any mode of proceeding? When the execution was served on him, he was compelled either to give bond, or to suffer his property to be sold. Having chosen the former alternative, he could not, by any means in his power, have averted the judgment. He acted throughout, under a species of duress. To confess a judgment, which could not be prevented in any legal mode, cannot surely come within the meaning of the act of assembly. That act can only reasonably apply to such errors as might be taken advantage of, if the confession had not been made.

Tucker, for the appellee, contended: 1. That the mere filing special bail does not discharge the appearance bail. The act of assembly (*b*) declares, that the appearance bail may be prodceeded against, if the principal does not both appear *and* give special bail. The word *and* cannot be construed *or*; because then *either* would suffice. But *appearing* without bail, will certainly not be sufficient. (*c*) So that the word "*and*" cannot be construed "*or*," and it is just as insufficient to give bail without appearing, as to appear without giving bail.

If then it be insufficient to give bail without *appearing*, the appellant cannot complain, for his principal did *not* appear. The appearance bail did indeed enter into a recognizance as special bail, but there was no *appearance* entered for the principal; of course, under the act, the proceeding went on against both.

But, admitting that the judgment ought not to have

(*b*) 1 Rev. Code of 1819, p. 500.(*c*) 1 Mun. 284.

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been entered against both, the appellant ought to have moved to have quashed the execution, and to correct the office judgment before he came here. *(d)*

2. The confession of judgment has released all error. The judgment, on the delivery bond here, is entered by consent of the defendants, of whom the appellant was one. This is a confession of judgment in the strongest form; for, it not only acknowledges the right to a judgment on the merits, but assents to its entry, whatever errors there might have been. It is, perhaps, stronger than the case of *Cooke and Pope*, *(e)* where the defendant agreed the plaintiff's damages; and stronger than *Leftwich vs. Stovall*. *(f)* That was a case of arbitration.

Here there being a confession of judgment on the delivery bond, the act of assembly says it shall be equal to a release of errors. But it seems to be supposed, this confession operates to release the errors in the proceeding on the delivery bond alone. But this is too limited a construction. The object of the act was to prevent frivolous and vexatious objections, where a party had solemnly acknowledged on record, that the debt, for which he was sued, was just, and that he was willing he should have judgment for it. The act has been construed *(g)* to dispense with the necessity of a declaration. Of what importance can it be, whether the proceedings in the original cause were regular or irregular, if the judgment against the defendant is by himself acknowledged to be just?

The proceedings on the forthcoming bond are in law considered as appendages to the original judgment and proceedings. *(h)* The reversal of the original judgment reverses or annuls the judgment on the delivery bond, and the supersedeas to the former also supersedes the latter. *(i)*

(d) 1 Wash. 303. *Leftwich vs. Stovall.* 4 Munf. Moss vs. Moss.

(e) 3 Munf. 167.

(f) 1 Wash. 303.

(g) 1 Wash. 306.

(h) 1 Cranch. 309.

(i) 4 Munf. 73, 260.

Briggs, replied.

BY THE COURT. The judgment of the superior court is to be affirmed.

Ellis and others, *against* Baker, executor &c.

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Where a marriage contract reserves to the wife, a power to give certain slaves to whomsoever she shall appoint, she is not authorised to direct a sale or emancipation of the slaves.

The case was this: James Ellis and Esther his wife, formerly Esther Thompson, William Caffa and Nancy his wife, formerly Nancy Davis, David Sawyer and Rhoda his wife, formerly Rhoda Davis, and Catherine Davis, filed their bill in the county court of Prince Edward, against Andrew Baker executor and trustee of Catherine Baker deceased, setting forth the following facts: that in the year 1811, the said Catherine Baker owned a number of slaves mentioned by name, and being about to marry a certain Caleb Baker, articles of agreement were entered into between them, by which it was stipulated that the said Catherine should, after the intended marriage, receive and enjoy during the joint lives of them, the said Caleb and Catherine, the interest and occupation of the real and personal estate, which belonged to the said Catherine before her marriage with the said Caleb; and that the said Catherine should, at her death, or at any time before, dispose of it as she shall think proper, notwithstanding her coverture. It was further agreed, that if the said Catherine should happen to survive her intended

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husband, she should not have any part of his real or personal estate: by the same articles, Andrew Baker was appointed trustee, with a provision that if the said Caleb should die first, the property should be delivered up to the said Catherine: but, if Catherine should die first, the property should go, *to whom she shall appoint*, by any writing under her hand and seal, or by her last will &c., and in default of such appointment, then to go to her four nieces, who are the female complainants: That Catherine Baker died in the lifetime of her husband Caleb Baker, and by her last will appointed and directed as follows: "After all my just debts are paid, I desire that my negro man Tom and Polly, and her children, be sold, but give them the liberty of choosing their master, and receive *all* the money that they are sold for, except a support for Rose and Arion, which is to come out of the sale of the above mentioned negroes to be sold:" that the said negroes Tom and Polly, and her children, are the subject of this suit: that the said Andrew Baker the trustee before mentioned, is also the executor of the said Catherine, and in that capacity continues to hold the said slaves, and is about to dispose of them by the authority derived from the last will of the said Catherine: that the devise to the said slaves is void, and the power of appointment was not duly exercised: that the title to the slaves has devolved on the complainants under the marriage agreement: that the debts of the said Catherine are few, and that there are assets sufficient in the hands of the executor to pay them, without making sale of the said slaves: that the executor has refused to deliver up the said slaves for the purpose of being divided, under a pretence that the power of appointment was duly exercised. They, therefore, pray that the said Andrew Baker may be prohibited from selling the said slaves until this suit is decided, and compelled to surrender them, for the purpose of being divided among the complainants, &c.

The several exhibits referred to in the bill, are filed in the record.

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The answer of Andrew Baker admits the marriage contract, as set forth in the bill, and relies upon the will of Catherine Baker, which he is advised is executed in conformity with the power reserved to her by the said marriage agreement.

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ecutor, &c.

The county court dismissed the bill, and upon an appeal to the Superior Court of Chancery, the decree was affirmed. A supersedeas was granted by a Judge of this court, and was argued by *Leigh*, for the appellants, and *Gilmer*, for the appellee.

Judge ROANE, delivered the opinion of the court:

The marriage articles relied on in the bill, and by which Catherine Baker imposed a law upon herself, in relation to the property in question, only re-invested the absolute property of the slaves, in her, in the event of her surviving her husband. That event did not happen. If it had, she might thereafter, have emancipated the said slaves, at her will and pleasure. During the coverture, however, she was, by the articles, only to have the use of the property, with a power to appoint it to others: and the true question is, whether, in the event which has happened, of her dying before her husband, she had a right, under the articles, to sell or manumit the slaves. We think not. The power given her is, that in the event of her dying first, she may give the slaves "to whomsoever she shall appoint," and in such part or parts as she shall choose. These expressions certainly do not justify a sale or emancipation of the negroes. They, on the contrary, contemplate the continuance of the slaves as property, and only give her the privilege of naming the persons who shall enjoy them: in default of which, it is declared that the present appellants shall succeed.

On these grounds, we are of opinion to reverse the decree, and remand the cause to be finally proceeded in, pursuant to the principles now declared.

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January.



**Cartersville Bridge Company,
against
Harrison and Cunningham.**

Where a corporation is created by law, to erect a toll-bridge at a given point, with the same power to apply to the county court "for leave to assure a road or roads, leading to the site proposed for said bridge, as is given by the existing laws, to the owners of mills and public landings;" the expense of opening the said road, is to be defrayed by the county in which the road may lie.

The legislature incorporated a company, under the name of The Cartersville Bridge Company, for the purpose of erecting a toll-bridge across James River, at or near the tobacco warehouse landing, in the town of Cartersville; (a) and by the 19th section of the law, they provided that the said company should have the "same right and authority to apply to the courts of the counties of Goochland and Cumberland, for leave to assure a road or roads leading to the site proposed for said bridge, as is given by the existing laws, to the owners of mills and public landings." The county court of Goochland appointed fit persons to "view a way for a road proposed to be opened by The Cartersville Bridge Company, from the Carter's ferry road to the site of the bridge proposed to be built by the said company across James River, and report to this court truly and impartially the conveniences and inconveniences that will result as well to the public as to individuals, if such may be opened."

The viewers so appointed reported, that in their opinion, the public would be greatly benefitted, when the bridge is completed, by opening a road to begin one hundred and ten yards below the ferry landing, &c., and that Ran-

(a) Sessions acts, 1818-19, p. 114.

dolph Harrison and Edward Cunningham, were the only persons likely to sustain injury from opening the said road.

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ham.

Summonses were issued and duly served upon Harrison and Cunningham, to shew cause, if any they could, why the company should not have leave to open a road according to the report of the viewers; and at another court, writs of *ad quod damnum* were awarded to ascertain the damages which would be sustained by opening the said road. The jury reported, that Harrison would sustain damage to the amount of three hundred dollars; and Cunningham, to the amount of one hundred.

The county court thereupon made an order to this effect: that having weighed all the circumstances. they are of opinion, that the said road, if opened, will be of little utility to this county, but of considerable advantage to The Cartersville Bridge Company; they therefore permit the said road to be opened, "*upon the express condition, that the said Cartersville Bridge Company shall pay to the said Randolph Harrison and Edward Cunningham, the proprietors of the lands through which the said road will pass, the damages assessed by the jury as reported in their inquests, and the costs attending the opening said road, and that the said damages and costs shall not be levied on the tithables within this county.*"

From which judgment, an appeal was taken to the superior court of Goochland, where it was affirmed.

A supersedeas was awarded by this court.

A statement of facts was agreed between the parties, and made a part of the record by consent, to the following effect: that three fifths of the capital stock of the said company were taken up by subscription, before the application made by the said company in this cause: that the bridge proposed is near to the main stage road leading from the city of Washington to the southern extremity of the union, and that the road now applied for, will lead from the said stage road to the said bridge: that the

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ferry just below the site of the said bridge has been generally kept in good order : that a witness proved, that if the said bridge shall be erected, and the road applied for opened, the people of Goochland (more especially those residing in the neighbourhood of the bridge) will derive that advantage which a bridge gives over a ferry ; and he believes, that there is considerable intercourse between the people residing in the upper end of Goochland and those of the town of Cartersville. Another witness deposed to the same effect. It is also admitted, that there is an inspection of tobacco in Cartersville, where a portion of the tobacco made in Goochland is inspected and bought by the merchants of the said town ; and that the merchants of the said town frequently purchase the crops of wheat made in Goochland, particularly of those dealing with them. .

The Attorney General, for the appellants.

Stanard, for the appellee.

Judge ROANE, delivered the opinion of the court, that both judgments must be reversed, and a judgment rendered establishing the road without annexing the condition.

**Hatcher's administrator, against Hatcher's
executors.**

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March.



A. purchases a tract of land and gives bonds with B. as his surety for the purchase money, but never takes a conveyance, nor pays the money. The vendor does not lose his lien upon the land, by having taken personal security.

In such case, the surety may go into a court of equity to subject the land to the payment of the debt, before he has been compelled to pay it himself.

**Appeal from the superior court of chancery for the
Richmond district.**

John Curd and David Royster, executors of Thomas Hatcher deceased, filed their bill in the court of chancery, against John Guerrant junr. surviving executor of John Johnson deceased, Philip Johnson and others children and heirs of the said John Johnson, Thomas Miller and John Brown administrators of Gideon Hatcher deceased, Gideon Hatcher and others, children and grand-children of the said Gideon Hatcher deceased. The bill sets forth, that a certain John Johnson, about fifteen or twenty years ago, was seised and possessed of a tract of land in the county of Goochland: that he died and directed by his will all his lands to be sold and the money to be divided amongst his children and appointed John Guerrant junr. and William Webster his executors: that the said executors sold the land, in pursuance of the directions of the testator, and Gideon Hatcher became the purchaser, and gave a bond for the purchase money, with Thomas Hatcher as his surety: that no conveyance was ever made by the vendors of the said land; so that a lien is still retained by the representatives of the said Johnson, and the purchase money was never paid by Gideon Hatcher in his lifetime, nor by his representatives since his decease: that the estate of Gideon Hatcher is totally inadequate to the payment of the purchase money aforesaid; and they fear that

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the estate of their testator will be compelled to satisfy the debt, without the interposition of the court of chancery. They therefore pray, that the land may be directed to be sold for the payment of the purchase money.

John Guerrant junr. as surviving executor of John Johnson deceased, filed his answer, stating, that he did, in conjunction with his co-executor, make sale at public auction of one of the tracts of land mentioned in his testator's will: that Gideon Hatcher became a purchaser of a part of the said tract, and gave Thomas Hatcher as his surety, in six several bonds, payable in six equal annual instalments: that Gideon Hatcher, in his lifetime, paid off a part thereof, for which he has full credit with the respondent; leaving a balance due of £ , and no part of which has been since paid by his representatives: that he believes, no conveyance has been made to the said Gideon Hatcher in his lifetime, or to his representatives since his decease: that he coincides in opinion with the plaintiff that the said lands ought to be sold, and the money, arising therefrom, applied to the discharge of the balance due upon the said bonds: that he is therefore willing that a decree should be rendered for the sale of the said land, &c.

The administrators of Gideon Hatcher filed a general demurrer, together with an answer, to the bill, in which they alledged, that Thomas and Gideon Hatcher were brothers, of whom Thomas was the elder, and had much the larger portion of his father's estate: that after the sale above mentioned, Gideon Hatcher moved on the premises and lived there until the time of his death which took place about the year 1807: that the appearance of Gideon Hatcher's being the proprietor of the said land, gave him a credit with the world: that in 1804, the said Gideon Hatcher became sheriff of the county, and by the default of his deputies in paying the revenue, a judgment was had against him by the commonwealth, in the sum of , and an execution was issued against the said land, which was taken by the coroner of the county, and sold;

but the sale was set aside for irregularity : that other executions were issued, and the land several times advertised for sale, but at length, after various impediments, the sale of the said land was forbidden, although, as the respondents believe, the executors of Johnson expressly disclaimed any lien on the land, until about the time that the sale was forbid : that in consequence of these transactions, the commonwealth, and the sureties of Gideon Hatcher as sheriff, are parties in interest in this case, and should be made parties to this suit : that the respondents believe, that they have fully administered all the personal assets of the said Gideon Hatcher, which ever came to hand, &c.

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Decrees nisi were duly executed upon the defendants who had not answered.

Some years after this suit, actions at law were brought on five of the bonds above-mentioned, and judgments recovered against the executors of Thomas Hatcher deceased.

The chancellor made an interlocutory decree, that an account should be taken, before a commissioner of the court, of the administration of Gideon Hatcher's estate. The commissioner reported, that the assets in the hands of the administrators, amounted to \$ 268 97 cents, and that there are unsatisfied judgments to a much larger amount, against the said estate. Whereupon, the chancellor decreed, that unless the defendants claiming under Gideon Hatcher, shall, within six months from the date of the decree, pay to the plaintiffs \$ 1930 25 cents, with interest &c., the said defendants claiming under the said Gideon Hatcher, shall be forever barred of their equity of redemption in the said land ; and the marshal of the court is directed to make sale thereof for ready money, &c.

From this decree, an appeal was taken to this court.

The case was argued by *Upshur*, for the appellant, and *Wickham*, for the appellee.

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For the appellant it was said: 1st. That it was in general true, that where a vendor retains the legal title, he has a lien upon the land sold. But, this lien may be waived by various acts, indicating the intention of the parties, that it should no longer exist. Taking bond and security is strong evidence that the vendor did not rely upon his lien; and when a great length of time is suffered to elapse, without the assertion of a title on the part of the vendor, coupled with uninterrupted possession by the vendor, there is no room to doubt that the vendor has waived his lien. In this case, all these circumstances are found. More than twenty years have elapsed since the sale was made to Gideon Hatcher. He has been in possession from that time until the sale under the commonwealth's execution, when we first hear of a claim by the executors of Johnson. During all this period, he was suffered to remain the ostensible proprietor of the land and to obtain a credit with the world, on that supposition. By analogy to the case of mortgages, the equity of redemption would be barred by twenty years without any attempt to foreclose.(a) If an *actual* mortgagee standing by, loses his right, how much stronger is this case, where Johnson had only an *equitable* mortgage? 2. The commonwealth ought to be made a party. She is a creditor, and ought not to lose her rights by the conduct of the executors of the appellee, in suffering an office judgment to go against them, without defence. 3. The decree ought not to have given relief beyond the penalty of the bonds. 4. There is no proof that the bonds were executed for the purchase money.

On the part of the appellees, it was said that a surety stands in the place of the creditor, when he has paid money for his principal;(b) and by a well known rule of equity, he may guard himself against a future mischief,

(a) 2 Bro. Parl. Cas. 116. *Lady Lanesborough's case*. *Taylor vs. Cole*, 1 Mun. 351.

(b) 2 Call, 125. *Eppes and al. vs. Randolph*.

by throwing the burthen at once on that fund where it must ultimately fall. If the executors of Johnson had a claim upon the land, and if the executors of T. Hatcher would have had the same lien upon paying the purchase money, a court of equity will subject the land in the first instance, and thus prevent a circuitry of action. As to the lapse of time affording a presumption that the lien was abandoned, this presumption may be rebutted by circumstances; and the partial payments by Gideon Hatcher, from time to time, are amply sufficient to produce this effect. No evil has resulted to Gideon Hatcher by the appellees suffering judgments by default; since they had not paid the money, and judgments must inevitably have been obtained, if they had defended the suit. The executors of Johnson asserted their claim as soon as it could be done, by forbidding the sale under the commonwealth's execution. There was no necessity for making the commonwealth a party, as there is no evidence of her claim, except the assertion of the appellant, which, being new matter, requires other proof. The claim of the appellees being prior in point of time to that of the commonwealth, ought to be first satisfied; and then, if any surplus should remain, the commonwealth may obtain satisfaction, according to the title which she may establish.

Judgments have been already obtained against the appellees, and the appellants ought unquestionably to indemnify their innocent sureties, although those judgments may exceed the penalty of the bonds.

Upshur, replied.

Judge BROOKE,* delivered the opinion of the court, that the decree of the chancellor should be affirmed.

* Judge Roane was absent from indisposition.

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Hatcher's
ex'rs.

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March.



McKim against Moody and others.

Where land has been recovered in ejectment, and the defendant goes into chancery, to obtain compensation for improvements, he will not succeed if he had notice of the plaintiff's title at the time of making the improvements.

This was an appeal from the court of chancery for the Richmond district, in which court William McKim filed his bill setting forth the following case: that an ejectment had been brought and a judgment obtained against him, by John Moody and Martha his wife, John Matthews and Sarah his wife, and others, which said female plaintiffs are the next heirs of Anne Moody deceased, who was devisee of James Swinton deceased: that the subject of the said suit, was a lot in the city of Richmond known by the number (644,) which was one of those known by the appellation of *stray* lots, under which denomination are included all the lots drawn as prizes in Byrd's lottery, for which the tickets have not been discovered: that the only title set up by the lessors of the plaintiff was an adverse possession of James Swinton for twenty years, without interruption, and prior to the occupancy of the complainant; and on that ground alone the jury found for the plaintiff: that the complainant does not impeach the propriety of the verdict, but that there was no sufficient evidence proving that the said Swinton had ever enclosed the said lot; on the contrary it was proved, that it was a thoroughfare for waggons, &c. which had made a road through it about the year 1799 or 1800: that, when the complainant came to the possession of it, it was unenclosed, and had been so for a long time before, and as he believed, unclaimed by any person: that it never was entered upon the books of the commissioners of the revenue, either in the name of the said Swinton, or of any person claiming under him: that the complainant

took possession with the knowledge of the said Swinton, who asserted no claim to it, and made no opposition : that he contracted with the late William Nelson, the agent of Charles Carter the surviving trustee of William Byrd, for the purchase of the legal title, but subject to the ticket, if it should appear : that believing it improbable, after the lapse of so many years, that the ticket would ever appear, the complainant commenced and completed expensive improvements on the said lot : that no permanent improvements had been made by him before this time : that during all this time, there was no intimation made to him of a claim on the part of the representatives of the said Swinton, nor was such claim ever made until after his improvements had been completed, a part of the lot which had been also expensively improved, had been disposed of, and real estate in the said city had greatly risen in value : that by the death of Charles Carter the agency of William Nelson ceased, and the complainant was prevented from obtaining a conveyance of the legal title ; he, therefore, prays that the judgment may be enjoined, until an account can be taken of the value of the improvements on the ground recovered, and of the mesne profits thereof : that he may have a decree for any balance of the said account, which may be in his favor : that in default of payment thereof by a short day, the said piece of ground may be decreed to be sold, and out of the proceeds of the said sale, payment may be made to the complainant as aforesaid.

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others.

An agreement, signed by William Nelson, jun., was filed with the bill, by which the said Nelson, as agent for Charles Carter, trustee of William Byrd, acknowledges that he has sold to William McKim the legal title to lot 644, which is in the said trustee, but not the right of the holder of the ticket ; and that the said McKim is to pay \$ 400 on the 1st of July, 1806, when the title is to be conveyed accordingly. The agreement is dated May 30th, 1805.

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others.

An injunction was awarded.

The defendants filed their answer, denying that the lot in question was a stray lot; but, on the contrary, that they believed that James Swinton, under whom they claim title, was the owner of the ticket which drew the said lot in Byrd's lottery, and that the said ticket has been lost or destroyed. They admit, that in their suit at law, they relied on an adverse possession of more than twenty years: that there was the most abundant evidence, that Swinton had enclosed the lot, and kept it enclosed for many years; and that if he did not keep the whole lot enclosed, he did a considerable part of it, until the day of his death. They deny, that the whole lot was unenclosed in 1799 or 1800, when the complainant states that he took possession of it; that Swinton paid taxes for the lot; and that the question of title is now definitively settled by the judgment at law: that they believe, that Swinton *lent* this lot to the complainant for a particular purpose; and he continued to hold it after Swinton's death, and during the minority of his friendless daughter: that Swinton confirms this suggestion in his last will, and says, that the purpose being answered, the complainant was his *ténant* at will: that the contract with Nelson opposes no obstacle to the pretensions of the defendants: that Carter's title was nothing more than the mere naked legal title, held for the person who had drawn the lot as a prize in the lottery, and can avail nothing in favor of the complainant, who has never obtained even that naked legal title, and does not pretend that he has ever paid one cent for it: that the complainant well knew, that the equitable title was outstanding in the holder of the ticket; and does not pretend that he ever was the owner of the fortunate ticket: that it is not true, that the improvements or any part of them were made by the complainant, without information of a claim to the lot on the part of Swinton's representatives: that the only case, in which the improver of property not his own is entitled to compensation for improve-

ments, is, where he has probable grounds at least to believe that he is improving his own property, and is ignorant, at the time of making the improvements, of there being a better title in any other person ; which was not the case with the complainant. They, therefore, pray a dissolution of the injunction.

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Many depositions were taken on both sides, which go to establish or disprove the fact that McKim had notice of Swinton's title, at the time he put the improvements on the lot. There is some difference among the witnesses on the points, whether the lot was partially or entirely enclosed by Swinton ; how long that enclosure was kept up, &c. It is presumed, from the event of the cause, that these questions of fact were decided in favor of the appellees ; and that it was considered that Swinton had an adverse possession of twenty years, of which title McKim had notice.

The chancellor dissolved the injunction ; and an appeal was taken to this court.

Nicholas contended, on the part of the appellant, that the lot was vacant when McKim took possession, and that he fortified his right by purchasing the title of Byrd's representatives : that McKim should be allowed compensation on two grounds : 1. That he had every reason to believe that his title was the best in existence. 2. That there was gross negligence in Swinton, if not fraud, in suffering McKim to proceed with his improvements, without giving notice of his claim to the lot : that the case of *Southall and McKrand*, (a) was a complete authority on this point : indeed, this case is stronger, because McKim had purchased the legal title whereas Southall had only an equitable claim : that Nelson was invested with full authority from the surviving trustee to dispose of the property ;

(a) 1 Wash. 336.

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and the contract with him gave McKim a right to call for the legal title, which, in equity, is equivalent to the legal title itself: that the evidence proved, that Swinton and those deriving under him, had lain by and permitted McKim to complete his improvements, without giving notice of their claim, and thereby had given McKim a right to compensation for his improvements. (b)

S. Taylor and the *Attorney General*, for the appellees, said, that it might be admitted that McKim really believed he had the best title to the lot, and yet it would not give him a right to compensation for the improvements. He must have had good grounds for that belief, and there must have been gross negligence or fraud in the appellees, in not asserting their right. With regard to the grounds upon which McKim believed himself to have the best title, the evidence abundantly proves, that he well knew the lot had been occupied by Swinton for above twenty years. The contract with Nelson was made without any authority; and if it had been, McKim had never entitled himself to demand a conveyance, as it is not pretended that he had ever paid one cent under that contract. As to the fraudulent silence of Swinton or his representatives, it is disproved by the facts in the cause. Swinton died in 1799, and his heir, an infant daughter, left the country immediately. The case of *Southall* and *McKeund* is not at all like the present. *Southall* was guilty of negligence in not bringing his suit for a number of years. It was supposed that he had abandoned his claim. Here, there was no reason for such a supposition. *McKeand* too had the legal title; in this case, McKim was a mere trespasser from the beginning. Nelson had no authority to make any conveyance; except to fortunate adventurers. A possession of twenty years is sufficient to give a title in ejectment. Indeed, Lord Mansfield has said that twenty

(b) Sugd. law of vendors, p. 522.

years possession is sufficient to found a presumption of a fee simple. (c) If one conscious of the defect in his title applies to equity for relief, his application will be rejected. (d) Whether McKim knew of the title of Swinton or not, he well knew that he himself had neither the legal nor equitable title, and this would be sufficient to deprive him of all claims upon a court of equity. (e) If the appellant should succeed in this case, then any man may take possession of real property, not in the actual occupancy of the rightful owner, particularly the property of infants and non-residents, and improve to any extent; and thereby acquire real security for the value of the improvements. Such a principle can never be sanctioned by a court of equity.

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W. Hay, junr. for the appellant, in reply. The appellees having succeeded in a court of law, their possession of the legal title cannot now be disputed; but, this concession does not affect the claim of the appellant to compensation for improvements. The principle, on which the relief claimed is given, extends as well to a legal as to an equitable title. In fact, the cases in which it has been given, presuppose an eviction of the possessor by a legal title. This principle is acted upon in every case where relief is granted against a judgment obtained at law, upon equitable circumstances of which the party could not avail himself, and which make it unconscientious in his adversary to hold his legal advantage.

The principle, upon which relief is granted in a case like the present, is *fraud*. The rule is borrowed from the civil law. (f) Courts of equity, adopting the principle, view the conduct of a man who recovers the property in a court of law, and with it the improvements, and who claims to hold them without compensation to the former

(c) Cowp. 595, Den vs. Bernard.

(d) Sudg p. 526.

(e) Johnson's reports 489, Jackson vs. Seymour.

(f) Inst. lib. 2. tit. 1, § 30. Digest Book 6, tit 1, 7, 38. Book 41, tit. 1, 7, 13.

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possessor, as unconscionable and fraudulent ; more especially, where the improvements, as in this case, are lasting benefits to the inheritance. They, therefore, interpose in favor of a *bona fide* possessor, and will not permit the person who has recovered, to hold the estate, without compensation to him. It is a case to which the maxim forcibly applies, "*nemo locupletari debet aliena jactura.*" *Peterson vs. Hickman*,^(g) and *Edlin vs. Battaly*,^(h) are illustrations of these principles and cases in which relief was given against the legal title. As to the objection that the appellant knew, at the time he entered, that he had no title, the answer is, that his title was honest as to the appellees. If their title was *legal*, it was a *dormant* one. It appears, that Swinton's neighbours were unacquainted with it ; and the appellant, upon the proofs, was equally ignorant of it. In reference to the owner of the ticket, he claimed to hold in subordination to his title, and became a trustee for him by his very contract with Nelson ; and if it was dishonest in the appellant to purchase the legal title, it was equally dishonest in the trustee to sell it ; a charge, which implicates very many individuals who hold their property, which they have expensively improved, by the same title. The omission to proceed upon the contract with Nelson, is explained by the death of Mr. Carter, the trustee.

Another title of the appellant to relief is, that the appellees stood by and permitted him to make his improvements, without making known their claim. It is proved, that they had knowledge of his proceedings, by the will of Swinton. The case of *Savage vs. Foster*,⁽ⁱ⁾ shews, that a person who stands by without making known his claim, acts fraudulently ; and the privileges of infancy and coverture are given for the protection of the parties, not to enable them to defraud others. As to the objection

^(g) Cited 1, Ch. Rep. 5, and in 18th Vin. Abr. tit. purchaser L. plea 1, page 125.

^(h) 2 Levins, 153.

⁽ⁱ⁾ 9 Mod. 37.

that the parties have a legal right which cannot be lost, like an equitable one, by the omission to assert it, it has no application to the case. The appellant seeks not to deprive them of their *estate*, as to which alone the maxim applies; but, claims compensation for an injury sustained in consequence of their fraudulent conduct.

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The case from Johnson, cited by Mr. Taylor, depended upon the provisions of a statute of New-York, and can have no application. It is open to the further observation, that the improvements were made after a grant had issued to another, which, being a recorded title, was notice.

Judge ROANE, delivered the opinion of the court, that the decree of the chancellor should be affirmed.*

* Judge Coalter absent.

Allen against Winston's administrator.

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March.

Where land is sold at public auction, and a third person makes a declaration in the hearing of the vendor and the bidders, that he is agent for persons having a claim to part of the land, but that an agreement has been made between him and the vendor, by which the purchaser shall not be injured by the conflicting claims, and the vendor remains silent, he shall be bound by such declaration.

Appeal from the superior court of chancery, for the Richmond district.

William A. Allen presented a bill to the chancellor, in vacation, praying an injunction to a judgment, which Edmund Winston administrator, with the will annexed of Edmund Winston deceased, had obtained against him, on

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a bond given by the complainant for a tract of land which he had purchased, at public sale, and which was directed to be sold, by the will of the said Edmund Winston deceased. He also prayed an injunction to stay the proceedings in a suit brought on another bond, given for the same consideration, on which judgment had not been yet obtained. The material facts set forth in the bill, were these: that Edmund Winston, the defendant, advertised for sale, at public auction, certain tracts of land in Buckingham county, being part of the estate of his testator, which sale was authorised by his will: that it was understood, that a fee simple title, with general warranty, was to be conveyed: that on the day of sale, some doubts were expressed with regard to the title of the testator, a claim having been set up by the heirs of one Elizabeth Hudson: that Edward Booker, the attorney at law for the heirs of the said Elizabeth, publicly proclaimed, that he had been employed to prosecute a suit for the land in question: that as soon as the requisite papers could be obtained, the suit would be instituted; but, that no purchaser could be affected by his clients' claim, as they had authorised him to state, that in case of the recovery of the land, they would be willing to receive the purchase money, and that it was immaterial to the purchaser to whom that was paid: that upon this, the complainant became the purchaser of one of the aforesaid tracts of land, containing 224 acres at \$ 13 05 per acre, for which he gave his bonds according to the terms of sale, believing that whoever received his money would convey to him an indefeasible title: that Edmund Winston delivered to him a deed, which he has since been advised by counsel is insufficient, and which he believes was written to defraud him: that in consequence of this opinion, the complainant has not had the said deed recorded: that judgment has been obtained on one of the aforesaid bonds, and a suit instituted on the other: that the heirs of the said Hudson, have brought a suit in the county court

of Buckingham against him, the said E. Winston and others, to recover the land aforesaid, which suit is still depending: He therefore prays an injunction to stay the proceedings in the said suits, until the suit aforesaid in Buckingham shall be decided, and he can determine to whom he is to pay the price agreed to be given for the land.

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Upon this bill, an injunction was awarded.

The answer of Edmund Winston, administrator with the will annexed of Edmund Winston deceased, admits the sale as stated in the bill: that the complainant became the purchaser of the quantity of land in the bill stated, and that he executed his bonds for the purchase money. He denies, that it was understood at the sale, that a fee simple title, with general warranty, was to be made to the purchaser; on the contrary, it was clearly understood, that the defendant would not make himself responsible for the title, and would convey only such as was vested in him by the will. He does not admit, that when the plaintiff executed his bonds aforesaid, he did it under the belief, that whosoever received his money would convey to him an indefeasible title; and he expressly denies, that he intended or practised any fraud on the plaintiff, in executing to him a deed for the land he had purchased. He asserts that the deed was strictly in pursuance of the terms of sale, distinctly announced at the time, and well understood, as he believes, by all the purchasers: that having heard in his father's lifetime of a claim set up by the heirs of E. Hudson, to some part of the said land, he resolved to make the sale in such manner as to guard against any responsibility for the title. He, therefore, on the day of sale, after the company had assembled, mentioned publicly that he had heard of the claim aforesaid: that he referred the people to Mr. Edward Booker (a lawyer, then present, who had been employed to prosecute the claim of the Hudsons,) for information: that Mr. Booker addressed the people publicly on the subject; told them that he had

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been employed to prosecute the claim ; that he was to have one half of the land he could recover ; that those disposed to purchase might go on to buy, notwithstanding his claim, and if it was afterwards found to be good, they might pay him the purchase money : that the defendant did not assent in any manner to this proposition, but on the contrary mentioned to several who were desirous to purchase, and he thinks to the plaintiff among the rest, that the declaration of Mr. Booker was calculated to lead them into an error, for, that he would not consent to their paying the purchase money to Mr. Booker in any event : that he would sell such title only as he had a right to sell, under his father's will, and would be responsible for none other : that the defendant, after Mr. Booker's address, and before the commencement of the sale, caused it to be proclaimed by the cryer, that he sold only such title as was vested in him by the will : that he believes that this declaration caused the land to sell much lower than it otherwise would have done. After the sale was over, a deed was executed to the plaintiff in strict pursuance of the terms of sale, who made no objection to it, although it was distinctly read over to him, and he read it himself ; and executed his bonds with the said Edward Booker, as his surety, for the purchase money : and as a further security, gave a deed of trust on the land itself. The defendant says further, that he does not believe the claim of the heirs of E. Hudson can be supported, and he suspects that the suit in their name has been probably brought at the instance of the plaintiff and other purchasers at the sale aforesaid, to enable them to delay the payment of the purchase money.

The plaintiff replied generally.

Many affidavits were taken on both sides, which go to establish the facts of Booker's declaration ; of Winston's silence ; of the proclamation made by the cryer that Win-

ston would not be responsible for any thing more than the title which he derived from his father; of the price of the land being enhanced by Booker's proclamation. One witness states, that he did not hear the proclamation made by the cryer.

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On motion, the chancellor dissolved the injunction.

A petition for an appeal, was presented to a judge of this court, and granted.

Leigh, for the appellant, contended, that Winston gave his assent to Booker's declaration that the land might be sold, and that the Hudsons would be content to receive the proportion which might fall to them, when their claim should be adjusted. Under such circumstances, *silence* was equivalent to *express assent*. It was the duty of Winston to have contradicted Booker's declaration, if he did not mean to sanction it. But, by remaining silent he led the purchasers into an error, and encouraged them to bid their money under a false expectation. That such was the effect, is proved by several affidavits, which declare that the land was enhanced in price, by the idea that the purchaser might pay his money either to Hudson or Winston, as their rights might be thereafter adjusted. But, the case does not rest merely on the *silence* of Winston. He *expressly* recognised the declarations of Booker, by referring to him on the day of sale, to give the people information of the state of the adverse claim. When, therefore, Booker made the statement in question, and Winston remained silent, what were the people to conclude, but that Winston assented to his statements? It is not consistent with natural equity, that Winston should receive the *whole* purchase money, when the title to a part of the land was in dispute.

Johnson, for the appellee. Winston did not acquiesce in the statements of Booker, but told many people that Booker had no authority to say any thing about the ap-

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propriation of the purchase money. Indeed, he publicly contradicted it by making the cryer announce, that he would only be responsible for the title which he held under his father's will. Booker was Winston's *adversary*, not his *agent*. He ought not, therefore, to be considered as adopting the assertions of Booker, by mere *silence*; even if he had not expressly *contradicted* them by the proclamation of the cryer. But, the subsequent conduct of the appellant places this subject beyond doubt. He gave an unconditional bond, and received a deed without a general warranty: that an executor or administrator is not bound to give a general warranty, is proved by a case in 3 Vez. jr.(a) and by *Syme vs. Johnson*.(b) The doctrine of failure of consideration does not apply to the sale of land evidenced by deed. The deed alone expresses the extent of the vendor's liability.(c) Cases of fraud are alone excepted.(d) But Allen has shewn no defect of title. It would be very easy to evade a just debt, if the bare allegation of a claim should be deemed sufficient to injoin it.

Leigh, in reply. There is no ground to presume any collusion between Allen and the Hudsons. The proofs are complete to shew, that this claim had long subsisted, and has since been actually put in suit. The evidence of acquiescence, on the part of Winston, cannot admit of a doubt. It is precisely similar in principle, to the case of a mortgagee standing by when the mortgaged lands are sold. As to the pretence that Winston contradicted the declarations of Booker, it is not proved by any of the persons to whom he is said to have spoken. But, if it were, such contradiction would not affect Allen, unless it was made personally to him. Booker's declaration was made publicly and heard by every one present. The pretended

(a) p. 233, 503.

(b) 3 Call, 558.

(c) Sugd. 313.

(d) Sugd. 315. Fonb. vol. 1, p. 261, n. g.

contradiction is said to have been made to a small circle of persons, none of whom are brought to confirm the assertion. The proclamation of the cryer, so far from being in opposition to the declaration of Booker, is perfectly consistent with it. Winston might very well say, that he would only be responsible for his father's title, and at the same time, that he would agree to divide the purchase money with the Hudsons, if they should recover any part of the land. As to the unconditional bond and the deed without general warranty, they both proceeded from the confidence inspired by Winston's conduct and the positive declarations of Booker, that the purchaser should run no risque. The cases cited by Mr. Johnson have no bearing upon a question, where fraud or deception is a principal ingredient.

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Judge BROOKE, delivered the opinion of the court.*

The court is of opinion, that although the appellee was not bound to give a general warranty, yet by the bill, answer, exhibits and depositions, it sufficiently appears, that he permitted it to be understood by the bidders and by-standers, at the sale of the land in question, in a manner equivalent to his express assent, that the purchase money was to be paid to him or to the representatives of Elizabeth Hudson, in the event that they had a better title. The court is therefore of opinion, that the injunction ought not to have been dissolved, until the state of that title had been ascertained to the satisfaction of the chancellor. The decree is therefore reversed, the injunction re-instated, and the cause remanded to be further proceeded in, according to the principles aforesaid.

* Judge Roane absent from indisposition.

1822.
March.
**Gay against Hancock and others.**

Where land is sold with general warranty, and a deed of trust given on the land itself, to secure the payment of the purchase money, if an adverse claim to the land is afterwards discovered, a court of equity will enjoin the sale, under the trust deed, until such adverse claim is regularly decided.

This was an appeal from an order of the chancellor, of the Richmond district, dissolving an injunction obtained by the appellant against the appellees, to stop them from proceeding under a deed of trust. The case was this: Gay purchased of Hancock, a tract of land called Chester Hill, the purchase money to be paid by instalments. He took a deed with general warranty from Hancock, and gave a deed of trust on the land itself to secure the purchase money. After several instalments had been paid by the appellant Gay, he discovered that there was a claim to the land by the representatives of David Ross, and a suit then actually pending for the same. Gay avers in his bill, that he had no knowledge of the existence of such a suit, at the time of the purchase aforesaid. Hancock, on the contrary, asserts in his answer, that he gave Gay full information of the claim of Ross, and cautioned him not to proceed with the purchase, until he had satisfied himself respecting the validity of the said claim. This assertion is not supported by any other evidence. The notes, given for the remaining instalments, were assigned to Judith Nicholson, and protested for non-payment when they became due. Whereupon, the trustees advertised the Chester Hill tract for sale. Gay applied for an injunction; which was refused by the chancellor, but granted by the judges of the court of appeals. Upon the coming in of the answers, the chancellor dissolved the injunction, and an appeal was taken to this court.

The case was argued by *O'Reilly*, for the appellant, and *Copland*, for the appellees.

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March.

Judge BROOKE, delivered the opinion of the court,* that it was error to dissolve the injunction, until the cloud, resting on the title in consequence of the claim of Ross, was removed. Therefore, it is decreed and ordered, that the order aforesaid be reversed and annulled; and that the injunction be re-instated, and the cause remanded to the court of chancery, to be further proceeded in.

Gay
vs.
Hancock
and others.

* Judge Roane absent from indisposition.

Findlay, executor &c. against Sheffey.

1822.
March.

A testator devises certain real property to be sold, and the proceeds to be divided in different proportions, among several legatees; and appoints two executors, both of whom unite in the sale of the said property. One of the legatees assigns his interest in the legacy to a third person. The assignee brings his suit in chancery against one of the executors only, and without making the other legatees interested in the sale of the said property, parties. On both grounds it is error in the court to render a decree in favor of the plaintiff. The court should also have an account of the sales of the said land, before rendering a final decree for any particular sum; notwithstanding the defendants have not answered, and the bill is taken for confessed.

This was an appeal from the Wythe chancery court.

The case, presented by the bill and exhibits, was this: Thomas King, by his last will, devised certain houses and lots in the town of Fincastle to be sold by his executors, and the proceeds to be divided among certain legatees, in the following proportions, viz: to the children of his son

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March.

Findlay,
executor,
&c.
vs.
Sheffey.

and daughter Connally and Nancy Findlay, two fifths : to his son and daughter John and Elizabeth Mitchell, two fifths : and to his son and daughter John and Hannah Allen, the remaining one fifth. He appointed three executors, only two of whom, Findlay and Mitchell, qualified. Allen, one of the legatees, transferred his legacy to Daniel Sheffey, for valuable consideration. The property, devised to be sold, was accordingly sold by both the acting executors. Sheffey brought a suit in Wythe chancery court against Findlay, one of the acting executors, and Allen the assignor, to recover the legacy due to Allen, and which had been transferred by him to Sheffey. The defendants not answering, a decree nisi was obtained against them, and duly served. On motion of the plaintiff, the accounts between the parties were referred to a commissioner. No account was taken; but at a subsequent term the chancellor made a decree, that the matter of the plaintiff's bill should be taken for confessed, and that the defendant Findlay should pay unto the plaintiff, four hundred dollars,* being the amount of the legacy left by Thomas King to the defendant John Allen and Hannah his wife, with interest on the same from the 9th day of May 1812, until paid, and the costs expended by the plaintiff in the prosecution of his suit.

The defendant Findlay obtained an appeal upon petition to the judges of this court. In the petition five errors are assigned. 1. Because the other devisees of an undivided interest were not made parties, as the rules and practice of courts of equity require. *Richardson's executors vs. Hunt.*(a) 2. Because Mitchell the co-executor was not made a party, he having proved the will, and the bill charging that he joined in the sale. 3. Because the wife of the said Allen was not a party, the interest in

*The only part of the record from which this precise sum can be obtained is the plaintiff's bill, in which he says that the two executors "sold the property in Fincastle for the sum of \$ 2000, as your orator is informed."

(a) 2 Munf. 148.

the legacy to her being hers until reduced into possession, and it being questionable at least, whether the Fincastle property could be considered as personal estate in the hands of the executors. 4. Because no final decree for any specific sum, ought to have been rendered, but an account ought to have been taken, that the nett balance might certainly appear, and any offsets exhibited; the order taking the bill for confessed, being only an admission that the plaintiff was entitled to an account. 5. Because the decree was not made on the usual and proper condition, that the plaintiff should give a bond to refund, in the case of creditors being unsatisfied.

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March.

Director,
executor,
&c.
vs.
Shelley.

The case was argued in this court, by *Wickham*, for the appellant, and *Johnson*, for the appellees.

Judge BROOKE, delivered the opinion of the court.*

The court is of opinion, that the other devisees interested in the Fincastle property, ought to have been made parties, and an account of the sales of that property taken. The court is further of opinion, that John Mitchell, the other executor, ought also to have been before the court, it being alleged in the bill that the sale was made by them jointly, and that the said decree is erroneous; therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellee do pay unto the appellants the costs, as well by themselves as by their intestate expended in the prosecution of the appeal aforesaid here; and it is ordered, that the cause be remanded to the said chancery court, for further proceedings to be had therein.

* Judge Rōane was absent from indisposition. *

1822.
April.

**Wilson against Spencer. McGuire against
Ashby. Snyder against Dailey.**

Although the act of February 24th, 1816, (2 Rev. Co. p. 111,) respecting unchartered banks, was suspended by the acts of November 1816, (2 Rev. Co. p. 115, 116,) yet the act of 1805, (2 Rev. Co. p. 111, § 2,) remained in force. Therefore, no action brought by an unchartered bank, on a bond given for bank notes emitted by the said bank, can be sustained.

A court of equity, as well as a court of law, will interfere to prohibit the effect of contracts, made in violation of laws enacted for the public good.

The principle *in pari delicto &c.* does not apply to cases in which the act complained of, is interdicted by the positive provisions of a statute.

The person, who merely takes the notes of an unchartered bank in payment, may not be as culpable as the institution which issues them.

These principles apply, as well to contracts prohibited under penalties, as to those expressly declared void by statute.

These three cases were argued and decided together; and as they relate to the same general principles, they are presented under one view.

The case of *Wilson &c. vs. Spencer*, was an action of debt originally brought in the court of Wood county, by Spencer against Wilson and Neale, on a note under seal. The defendants filed two special pleas stating, in substance, that the note on which the action was brought, was given to the president of an unchartered bank, established contrary to the provisions of the statutes in such case made and provided, and that it was given in consideration of bank notes, emitted by the said bank, in equal violation of those statutes.

To these pleas, the plaintiff filed a general demurrer, and the defendants joined.

The county court gave judgment for the plaintiff; which judgment, upon appeal to the superior court, was affirmed. The defendants appealed to this court.

The case of *McGuire vs. Ashby*, was a suit in chancery.

Ashby and Stribling, merchants, being creditors of one Murray, took a deed of trust from the latter, on a tract of land, to secure themselves. Previous to this deed, Murray had conveyed to Powell as trustee for McGuire, the same land which was included in the deed to Ashby and Stribling. The land was advertised for sale under the deed to Powell. Ashby and Stribling applied to the chancellor of the Winchester district, for an injunction, to stop the sale under the deed of trust to Powell; alleging, that McGuire was not the real creditor in the deed from Murray to Powell, but that it was in fact for the benefit of the unchartered bank in Winchester. He contends, that the deed is void by the laws of Virginia, and that the sale under it ought to be enjoined.

1892.
April.
Wilson,
vs.
Spencer,
&c.

The chancellor awarded the injunction.

McGuire and Powell put in their answers, admitting that the deed above mentioned was for the benefit of the bank of Winchester, as stated in the bill; but they contend, that the bank had a good and legal right, under the act of 1816, to take any security for money due them, to sue for the same, and indeed to carry on all their operations.

A motion to dissolve was overruled, and an appeal allowed to this court.

The case of *Snyder against Dailey*, was an appeal from the chancery court of Winchester, on an order of that court, dissolving an injunction. The case was this:

Charles L. Snyder had become bound in two notes under seal, with John Snyder as his surety, to James Dailey, for the sum of \$2,535. James Dailey brought suit at law, and recovered judgments to that amount. John Snyder afterwards presented a bill of injunction to the chancellor of the Winchester district, alleging that those notes were not given to Dailey in his individual character, but as president of an unchartered bank, known by the style of the president and directors of the Bank of the

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April.

Wilson,
vs.
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&c.

South Branch of Potomac; that this institution was illegal, and its acts rendered void by the laws of Virginia. There is also a detail of transactions between the several parties to the suit, going to shew, that the complainant is entitled to large discounts, even admitting the validity of the contracts; but, as these matters are not at all embraced by the arguments or the decision of the court, they are omitted.

The chancellor refused the injunction; which was awarded by a judge of this court.

James Dailey filed his answer, in which he admits that the debts in question were due to the South Branch Bank of Potomac, as alleged in the bill. He then makes a counter-statement of the transactions between the parties, which, for the reason already assigned, is not deemed material to this report.

Depositions were taken and exhibits filed; and on motion, the injunction was dissolved; on which order an appeal was allowed to this court.

*W. Hay, junr. for the appellants, Wilson and Neale.**

The appellee having demurred generally to the pleas of the appellants, has thereby confessed the facts well pleaded.

It may, therefore, be assumed that the single bill upon which the action is founded, was executed to the appellee, the president of an illegal unchartered banking association, to secure the re-payment of notes emitted and issued by it, of the character, tenor and effect of bank notes, and loaned by its officers to one of the appellants; and that the said bank was established for the purpose of making and emitting notes of that character and tenor; for such is the substance of the pleas. The case may be con-

* Although Mr. Hay was only counsel in one of the suits, yet his argument is equally applicable to them all.

sidered, 1st upon the act of 1805 ;(a) 2nd, upon the acts of February and November, 1816.(b)

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I. Upon the fair construction of the act of 1805, the single bill, being founded on a contract directly contravening the provisions of that act, is void ; and this, although the statute is penal in its enactments, and does not in terms avoid the contract or security.

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It is a principle of the common law, that an action cannot be supported upon a contract, or a security, the consideration of which is illegal, as being against either the positive prohibitions or the policy of the law : and courts have applied this principle to prohibitions flowing from statutes. Upon principle, there can be no distinction between the cases. The only ground upon which a difference can be supposed to exist, is, that when the legislature prohibit an act under a penalty, without vacating the contract in terms, it may be supposed they did not intend it should be void.

But this argument, however specious, has not been allowed to prevail. It is said by lord Holt in the case of *Bartlett vs. Viner*,(c) " that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender ; because, a penalty implies a prohibition, though there are no prohibitory words in the statute." And to the same effect is Sir James Mansfield in *Drury vs. Defontaine*.(d) It is no objection to this principle, that penal statutes are to be construed strictly. This is true, where the penalty is claimed. But in other cases, when the statute is made for the prevention of a public mischief, it is the duty of courts to give it a liberal exposition.(e) As contracts contravening the provisions or policy of a statute are held

(a) 2 Rev. Code of 1819, p. 111.

(b) *Ib.* p. 111 & 115.

(c) *Carthwe*, 252.

(d) 1 Taunton, 136.

(e) *Law vs. Law*, Cas. Temp. Talbot, 144.

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to be void, by an application of the common law principle adverted to, the extent of that principle will shew how far contracts and securities founded upon them are made void by statutory prohibitions.

By the common law, a contract or a security founded upon it, is void, not only when it directly violates its provisions; but also, when in its consequences it may have that effect, as if it have a tendency to encourage the violation in others. (f) And so, with regard to the statute law: if the contract be, to do the thing which is prohibited under a penalty, it is void. So also, if the contract be *collateral* to the illegal act, but has a tendency to encourage it, and thus militates against the policy of the statute, it is void. (g) From all these cases, (and many more might be added,) the principles which have been asserted, may be very clearly deduced, and it will appear from an examination of them, that lord Alvanley was fully warranted in saying that it is the result of all the cases, "that no person can come into court and demand its aid upon a contract made in contravention of the laws." (h) Such is the case under consideration. By the second section of the act of 1805, it is made unlawful to offer in payment any note or bill, whether payable to bearer or other persons, which shall have been emitted by any banking company not having a charter.

The contract in this case, between the bank and the appellants, was, both directly and consequentially, a violation of the provisions of the statute, and of course the security founded upon it is void. It was so *directly*; because, the very act of discounting, was a circulation of notes of the character and kind proscribed by the statute; and also

(f) 1 Powell on contracts, 196 to 199.

(g) Biggs vs. Lawrence, 3 Term. Rep. 454. Clugas vs. Penaluna, 4 T. Rep. 456. Weymel vs. Read, 5 Term. Rep. 599. Nerot vs. Wallace, 3 T. Rep. 17. Lightfoot vs. Tennant, 1 Bos. and Pull. 552. Gallini vs. Laborie, 5 T. Rep. 242. Ribbons vs. Cricket, 1 Bos. and Pull. 264. Parkin vs. Dick, 11 East 501. Hunt vs. Knickerbocker, 5 Johnson's Rep. 320.

(h) Marek vs. Abel, 3 Bos. and Pull. 38.

consequently, as it led to their circulation by the appellees and others, who might receive them.

II. If such be the construction of the act of 1805, the case is not varied by the subsequent acts.

In the first place, the court cannot notice these acts. They were not in force when the note was executed, and the action instituted. The note is dated the 16th of March, 1816, and the action was instituted in July, 1817. The act of February, 1816, was to go into operation on the 15th of November ensuing; on which day the suspending act was passed, postponing its operation until the 31st day of August, 1817, leaving the act of 1805 in full force and applying to the case. It is true, the act of February, 1816, was in force before the determination of the suit. But this is immaterial; the act is prospective in its operation. But if otherwise, it cannot be applied to actions pending at the time of its commencement, without a violation of the rights of the parties.⁽ⁱ⁾

But, conceding that it is competent to the court to notice them, how do they affect the case? It will be said, that by the suspending act, the legislature have agreed in relation to the unchartered institutions named in it, that they shall have farther time to wind up their business, and have thus virtually conceded the capacity of suing. But this is a construction which cannot be supported. If the words of the enacting clause are unambiguous, they cannot be controlled by the preamble.^(j) To have the effect contended for, the act of November, 1816, must not only suspend the act of February, 1816, but also *repeal* that of 1805, because by the latter act they have no capacity to sue. This it has not done *expressly*, and will the court *imply* a repeal? The consequence of such a construction would be, that the banks must go on to emit and circulate their notes, as there would be no law in force to restrain

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⁽ⁱ⁾ Couch vs. Jefferies, 4 Burrow, 2462.

^(j) Crespigny vs. Wittenoom, 4 T. Rep. 793.

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them. Did the legislature intend this? Surely not. They intended, as their words import, only to suspend the act of February, 1816, by which the banks and their officers obtained an exemption from the heavy penalties imposed by that act, leaving the act of 1805 in full force.

Again, it will be said that the several acts being in *pari materia*, the court, in deciding the case, will take all of them into consideration, and view them as mutually explanatory, and that the legislature having, by the act of February, 1816, expressly taken away the right of suing from the banks and their officers, have put a construction upon the act of 1805, different from the one relied on, and by which the courts are bound.

The first answer to be made to this argument is, that it is the province of the legislature to declare what the law *shall be*, not *what it is*. Such a power cannot be conceded to them, without placing private rights at their mercy. If the nature and legal effect of the contract between the appellants and the appellee is, upon the construction of the act of 1805, such as has been stated; the exposition of that act by the legislature, admitting that they have made it, can upon no principle be obligatory, either upon the parties or the courts. And it is the duty of the courts, if the legislature have acted under a mistake of the law, to disregard their construction, and to decide pre-existing cases, by the law as it stood when they occurred. This would be no novel proceeding. Courts have often had occasion to decide, that legislative provisions were unnecessary and merely declaratory of what the law was before their enactment. Such was the declaration of lord Mansfield, in relation to the statute concerning fraudulent conveyances; and for which there is also the sanction of this court, in the case of *Fitzhugh vs. Anderson*. (k)

But it is not admitted, that the legislature have put such

a construction upon the act of 1805. That of February, 1816, is manifestly cumulative in its provisions, and may well stand with the construction put upon the act of 1805 by the appellants. This will be apparent from the slightest inspection of the act. It interdicts *every species of banking*, by any association of individuals, not having a charter. Such was not the effect of the act of 1805. That act did not prevent individuals from associating themselves as a bank of deposit, or even of discount, provided they did not emit their own notes. Such, however, is the effect of the last act; in addition to which, it had the further object of imposing heavier penalties and forfeitures. And the legislature may have supposed it necessary to insert the provision, which has been relied on, in order to meet cases not within the purview of the act of 1805.

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An argument, similar to the one which has been combated, was urged, but did not prevail, in the case of *Langton vs. Hughes*. (1) In that case, where an act of parliament, interdicting the right of suing in certain cases, was relied on, by which the act was merely prohibited, the same effect was produced.

Upon the whole, it is not easy to conceive, upon what ground the claims of the banks can be supported. An argument, which is specious, but not solid, may perhaps be urged; that, from the number of these institutions and their extensive dealings, great inconveniences would result from that construction of the law, which debars them of the right of suing, and that the court, in order to prevent one public mischief, will not adopt a construction, which would, perhaps, introduce a reater.

But, if the law be clear, the court cannot omit to enforce it, from a consideration of the inconvenience it may occasion. And in fact, the greater the confederacy, the greater is the mischief, which it was the design of the law to repress; and therefore the necessity of executing the law.

(1) 1 Maule and Selwyn, 593, *Langton vs. Hughes*.

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Leigh, contra. These three cases all present the general question. Whether contracts made by individuals with these unchartered banks, prior to the 31st of August, 1817, (till which time the act of assembly of February 14th, 1816, for suppressing these associations, was suspended, for the avowed purpose of giving them time to wind up their affairs,) were so contrary to the prohibition, or to the policy, of the law of the land, that neither party ought to be entertained in a court of justice, to enforce such contracts, or to adjust the rights claimed under them? In other words, whether all such contracts ought not be deemed and treated as wholly void?

It is insisted, that as the act of January, 1806, made it unlawful for any person, to offer in payment any note or bill whether payable to bearer or any other person, emitted by any unchartered bank company, under a severe penalty for every offence; (a) an unchartered company, formed for the purpose of emitting such notes or bills, for the very purpose of supplying materials for the perpetration of the offence, must be contrary to the policy of the statute, if not to its letter. Neither can I attempt to maintain, that these unchartered bank companies, whatever were the devices they contrived to evade the statute, were not associations contrary to its policy. I own, that, in reference to the question before the court, I can see no distinction between the evasion and the violation, of such a statute.

This being premised, it is next asserted, in the words of Lord Holt, "that every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is void, though the statute do not expressly declare it so, but only inflicts a penalty on the offender; because every penalty implies a prohibition, though there be no prohibitory words in the statute:" that contracts, contrary to the policy of the law, are within the same reason, and equally illegal and void: nay fur-

(a) 2 Rev. Code, c. 207, § 2, p. 111.

ther, that contracts, not directly connected with the act prohibited, but only conducive or collateral to or dependent upon the act prohibited, are also illegal and void: and, consequently, that the doors of the courts of justice are shut against all claims founded upon or growing out of such contracts.

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I waive all examination of the numerous cases, cited by Mr. Hay, in support of these doctrines, though they are open to much commentary. They are all cases in which some two or three individuals, were the only offenders, or the only accessaries to the offence; in which, to shut the courts of justice against their claims, might operate as a punishment on the few offenders concerned, without inflicting punishment, much more serious mischief and even ruin, on large masses of the community. In the cases cited, the doctrine has been applied to the chastisement of individual sins. But the case of these unchartered banks was a disease of the body politic. The offenders against the act of January, 1805, were the whole people of some twelve or more of the largest counties in the commonwealth. The most respectable and intelligent men in that large tract of country, (with very few exceptions,) were members of these irregular associations. Their notes were in general circulation; and there was hardly an individual, who did not receive, and pay them away; in other words, who did not violate the law. It is matter of history: there was a general rage throughout the state, for bank capital, and bank accommodation. *Quem DEUS vult perdere, prius dementat.* But it is not the province of man, to punish the madness of his fellow men with ruin. It was said by a very wise and great man, that he did not know how to frame an indictment against a whole people: and I do not know how to apply the principles asserted by the chancellor, and maintained by Mr. Hay, to the large and populous counties, who fell into the guilt or the folly of these bank associations. I shall shew in the sequel, that the legis-

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lature viewed the subject in the same light; and whether it be the province of the judges to go beyond the legislature in severity, let the wisdom of this court decide.

Let us however take the broad doctrines, stated by Mr. Hay in argument, and by the chancellor in decision, for law. If ever law was administered according to the letter, without regard to its reason or its spirit, here is an instance of it. Nay more, it is demonstrable, that the law on which the chancellor founds his decrees, defeats, under his administration of it, its own acknowledged ends.

The principle, on which courts of justice have refused to entertain claims founded on contracts, entered into in opposition to prohibitory laws, or in contravention of their policy, is obviously this: to discourage such unlawful contracts, and to punish the parties to them, by withholding from them the iniquitous gains they hoped to acquire by the violation or evasion of the laws, or by refusing them all retribution for losses sustained in consequence of such violation or evasion. Whenever, then, the principle is pushed to that extreme, that the chief violators of the law are permitted to retain all their unjust gains, and all the losses are thrown upon the suffering community, the principle is extended beyond its reason and spirit, and far from accomplishing the ends for which it was designed, works the direct contrary effects. Now, let us apply the chancellor's doctrine to the case of these unchartered bank companies, and test the justness of the application, by the consequences.

The act of January, 1895, to prevent the circulation of private bank notes in any form, is (as was justly said by Mr. Hay,) to be liberally construed to suppress the mischief. Whoever receives one of those notes in payment, is as much a party to the violation of the act, as he who pays it; both join in giving circulation to the note, which is the evil the statute meant to prevent. Whoever receives one of those notes, becomes an assignee of a contract made with the private bank company; and in that character

only can he sue the company, if payment be withheld. If he sue, he is met by this rule of law: this contract which you are seeking to enforce, is contrary to the express prohibitions of the law, or at least to its policy, and therefore the courts of justice are not open to you. The consequence is, that by this application of the rule of law, the offending company, whom the rule was designed to disappoint and punish, may shut up its exchequer, pocket all its illicit gains, and rest secure in a complete absolution from its debts.

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Again, let us suppose that the unchartered bank (through the obstinate inertness of the courts of justice) has accomplished this fraud on the public, and that the stockholders are pleasing themselves with the anticipation of the fruits; or let us suppose, that the company, having diligently wound up its affairs, and honestly paid all its debts, meet to divide to each shareholder his portion of the original stock: the officers of the institution (the most guilty, or at least the most certainly obnoxious to punishment) resolve to play the game which the courts of justice have taught them, against their principals, the stockholders; and in the face of day, empty the contents of the vaults into their own pockets. According to the broad doctrine, and the broader application of it, asserted in these cases, no action will be entertained against them, at law or in equity. Not only the original stockholders, but all who may have been deluded to purchase their shares; the ignorant and unwary; the widow and the orphan; these must pay the penalty; while the most guilty not only escape without punishment, but depart with affluence and safety.

Again, suppose a man had contracted to sell his property for a given price payable in these unchartered bank notes (then the principal circulating medium in that country.) If the price be paid in the stipulated notes, and though the banks be solvent, the courts of justice will not entertain his action for the contents of the notes; no more will they entertain his suit against the purchaser, either

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for the property thus sold for a consideration that has utterly failed, or for the stipulated price : the purchaser, though he might have borrowed the very notes for the purpose of making the payment, and was the chief offender in putting them into circulation, reaps a clear gain ; and the vendor, though no more guilty of violating the law than any other man in the community, is mulcted with the whole loss. If the price be not paid, the purchaser may securely enjoy the property without fear of retribution or reclamation ; for, if his creditor appeal to justice, she turns a deaf ear to his complaints, and shuts her doors in his face.

Instances of the like kind, might be multiplied without number ; instances, which would shock the moral sense of mankind, and dishonor the name of justice. Enough have been suggested, to shew, that this sweeping application of the principle of the common law, on which the chancellor has founded his decrees, is not only a departure from its reason and spirit, but defeats its ends, and works the very mischiefs it was intended to prevent ; that, whereas the *principle itself* was designed and established, to discourage illegal contracts, and for that end to punish the guilty parties to them, by a sort of outlawry in respect of those contracts, this *application* of it would encourage all such schemes, by giving all the gains to the most guilty, and throwing the losses on those who have least offended, or even on the innocent.

The principle in question, rests on too narrow a basis, and its aim is quite too confined, to be applied to the case of these unchartered banks. The numerous and extensive associations of such companies, was, (I repeat,) a distemper of the state, which called for the application of a general enlarged policy, of a sound political economy, that might best eradicate the evil, and avert all the mischiefs it threatened. It can never be the policy of the commonwealth, to correct the evil of a vicious circulating medium in any district of country, by rendering it more

vicious. The direct tendency of this doctrine, which would bar these unchartered banks of all resort to the courts of justice, to collect the debts due to them, is, to withhold from them the means of taking in the condemned medium they put into circulation. It must depreciate: it may become utterly worthless. The paper emitted by these banks amounted, on a moderate calculation, to a million of dollars, if the imprudence of the execution bore any proportion to the indiscretion of the design. The debts contracted to them amounted to as much. Truly, the penalty which the chancellor's doctrine would inflict, is enormous, and the objects of legal vengeance numerous beyond all example. It is little less, in effect, than a proclamation of outlawry against the good people of his two chancery districts, in respect of the greater part of their contracts, during the time these unchartered banks existed among them.

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What is this doctrine, the application of which to the cases at bar I am resisting, (for I do not controvert the doctrine itself,) but a part of the *policy* of the common law? It is as competent to the legislature, to alter the policy of the common law, as any of its positive institutions. Let us see, whether the acts of the legislature have not indicated a direct contrary policy in the case of these unchartered banks.

All the statutes, being made *in pari materia*, are to be taken together; and taking these statutes together, I affirm, that when the legislature set about to suppress the numerous unchartered banks, which had been recently formed, by its act of February, 1816,(*e*) it designedly and wisely waived all consideration of the legality or illegality of those institutions. The act was altogether prospective; and its obvious policy was, to legalize the unchartered banks, so far as to enable them *bona fide* to close their transactions; and, by consequence, to legalize those trans-

(*e*) Rev. Code, c. 208, p. 111.

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actions themselves ; for, the legislature could never have intended to give time to close illegal transactions.

The 1st section of the act of February, 1816, makes it unlawful, for any unchartered company then formed or to be formed, to commence and continue bank operations, *from and after the commencement of the act* only.

The remainder of the 1st, and the 2nd section, impose heavy penalties and forfeitures, *for the violation of that particular act* only.

The 3rd section vacates all such contracts between unchartered banks and dealers with them, entered into for the benefit of the banks, as should be made *contrary to the provisions of that act*, but none others ; not contracts previously made, or which should be made before the commencement of the act, in furtherance of the end of closing their transactions.

The 4th section subjects any person who should, *after the commencement of the act*, as president, manager or cashier, sign, counter-sign or endorse any note of any such unchartered bank, to summary motion and judgment at the suit of the commonwealth, for three fold the amount of the note ; no penalty is inflicted for notes previously emitted.

The 5th section vacates all such contracts for forming such unchartered bank companies, as should be made *after the passing of the act*, and none other.

The 6th section provides, that, if any unchartered bank issue any notes *contrary to the provisions of the 1st section*, the holder or owner of such notes, should have summary remedy by motion, for the amount of such notes, and fifteen per cent. damages, against all or any of the members ; but, is silent as to all notes issued not in contravention of the 1st section.

The 7th section shuts the courts of justice against all claims and suits on behalf of the unchartered banks, for debts originating out of any dealing or trading, *contrary to the provisions of that act*. *Expressio unius est exclu-*

sio alterius. The courts of justice were left open to them, as to all contracts not made in contravention of that particular statute.

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And the last section postponed the operation and commencement of the act to the 15th November, 1816.

The two acts of November, 1816, (*p*) reciting that fifteen of the unchartered banks by name, (the institutions intended to be suppressed by the act of the preceding session,) had proceeded with a *bona fide* intention of closing the transactions of those institutions, in conformity of the provisions of the act of February, 1816, but found it necessary to ask more time for the same; therefore, these acts farther suspended the act of February, 1816, till the 31st August, 1817. These acts declare, that the intention of the act of the preceding session, was, to give the unchartered banks time to close their transactions; and that not having given enough, these give more. To give them time to close their transactions, were vain and illusory, if they were meanwhile interdicted by law from coercing payment of, or securing, the debts due to them; that is, from closing their transactions.

Surely, the policy of these laws was, to give the unchartered banks every opportunity of securing and collecting the debts due to them, in order to pay those they owed; and even to stimulate them to the utmost activity. Surely, the policy of these laws is wholly irreconcilable with that policy of the common law, now brought to bear on these associations, or rather with the forced application of the principle, which would in effect outlaw them.

The policy of the statutes must prevail. As to the proposition, that it was not competent to the legislature, to legalize the transactions of these unchartered banks in that partial degree, necessary to cure the evils which had grown out of them, at the same time that the cause of disease and mischief was eradicated; I do not mean to

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discuss it, and in truth know not how. If the legislature had given all these companies a charter, confirming their articles of association, and legalizing their transactions from the beginning to the full extent and term of their original protection, I could not have heard without surprise, a denial, or the least doubt, of its competency to make such enactments, and to bind the citizens, and the courts of the commonwealth, to respect and enforce them.

If I am right, the judgment in the case of *Wilson and Neale vs. Spencer*, must be affirmed. The decree in *Snyder vs. Dailey*, must be reversed, and the cause remanded to be matured for a hearing on its merits; for, it is agreed on all hands, that it is not ripe for a decision on its merits now. And the decree in *McGuire vs. Ashby and al.* must be reversed, and the injunction dissolved.

Tucker, in reply. In these cases I maintain no inconsistent propositions. I contend that contracts made with the unchartered banks were void; and that therefore *Ashby's* deed of trust, which was no bank transaction, takes preference of *McGuire's*, which was one. I contend also, that *Snyder* is entitled to relief on principles of public policy, and that his contract with the bank is not only void, but that a court of equity will declare it so. In both cases, therefore, I seek to avoid the bank contract.

That the unchartered banks were illegal associations, is admitted by *Mr. Leigh*. He could not have done otherwise. The act of 1805 had prohibited the circulation of private bank notes. If to put one note in circulation, was illegal, to associate for the circulation of thousands, must have been so. The banks were therefore unlawful institutions. But, it is of some importance to dwell on the character of their infraction of the law. It was an usurpation of one of the most valuable prerogatives of the sovereign power; the power of regulating the circulating medium. The history of the last ten years has proved the importance of guarding this power with jealous cir-

cumspection; and if the courts can throw before it the shield of the judiciary, it is wise and politic to do so. The difficulty of suppressing associations of this description, furnishes additional motives for firmness in the exercise of those judicial functions, which may cripple and destroy them. The consideration that many very honourable and upright men may have been concerned in them furnishes no reason for relaxing the rules of law. Of all illegal establishments, large monied institutions of this kind, are most dangerous. Operating upon the purse, their influence is all powerful. Lending their paper to the needy, the needy become their instruments in forcing into circulation, a currency which is reprobated by the laws. Soon, every man within their sphere, becomes in some way or other, an accomplice. Every man in the ordinary transaction of business, has been compelled to receive and to pay away the illegal paper which has driven all other from circulation. Thus no grand jury can be found to prevent; no attorney to prosecute; no jury to convict of an offence, of which all are equally guilty. The influence acquired, is moreover dangerous and alarming. Public opinion is affected, and in its turn, affects the legislative body. The general assembly is besieged by the advocates of the banks, and but for the exemption from similar influence in other parts of the state, we should have had an act legalising all these institutions. In fine, defeat in these efforts has been, by many, believed to have originated a plan for altering the constitution. It may well be said, therefore, that such establishments are illegal and dangerous, and if the evil be a disease of the body politic, it requires so much the more vigorous treatment for its cure.

What then are the remedies which the law has provided for such a state of things? What are its provisions for its own vindication? Penalties for violation, and the vacating illegal contracts. The first are evaded. The latter remedy alone remains. Shall this, too, be laid aside, and

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these dangerous inroads upon the law passed by without notice? By no means. The more extensive the mischief, the more necessity for vigour. Neither reason nor authority, justifies Mr. Leigh's distinction, that what will be punished as a sin in a few individuals, will be overlooked because it is committed by thousands. Indeed for this "disease of the body politic," as it is called, there is no more appropriate remedy, than the refusal to hear the offender in the courts of justice. Nothing brings home to our bosoms the necessity of law, more than the inconvenience of being denied its assistance. The operation of such a penalty is also silent, though effectual. Heavy penalties to be inflicted by criminal prosecutions, either are not enforced, or produce heart-burnings and discontent, and sometimes revolution or revolt. But he, who has disregarded the law, cannot complain, that the law will not help him.

In consonance with these principles, we find that suits cannot be maintained on a contract against the policy of law. Is it reasonable, that a court organized to *execute* the law should assist in *breaking* it? If a party commence a suit on an illegal contract, will the court assist him if that appears by his declaration? Or if it appears by the plea, is it not the same in principle? Or if the wrongdoer has obtained the advantage in a court of law, by hiding the real character of the transaction under a trustee's name, shall even a court of equity refuse its aid in vacating the contract and vindicating the law? By no means. Authority concurs with the reason of the thing in supporting the negative. Thus, a court of law will not aid the plaintiff who seeks to enforce an illegal contract whether in restraint of trade or marriage, or in cases of smuggling, &c, &c; (*q*) and the rule in a court of law is laid down explicitly to that effect. (*r*) A court of equity too will lend its aid. (*s*) And the objection of *particeps*

(*q*) 3 T. R. 17, 454. 4 T. R. 466. 5 T. R. 599.

(*r*) 3 Bos. and Pull. Lord Alvanley, page 34.

(*s*) 3 P. Wms. 391. Talbot, 140.

criminis never prevails. (t) For, relief is given not to the party, but to the public through him. (u) These cases in equity are decisive that Snyder should have been relieved. The order of dissolution in that case must therefore be reversed; for Snyder was not *pari delicto*. (v) He was entitled to credit at least. (w)

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But it will be objected, that it is iniquitous that he who has borrowed the money should not return it. The law abounds with such instances. Such are usury cases; money lent to game with, the proceeds of sales of Lottery tickets, goods sold to be smuggled, and various others in none of which can the wrong-doer recover even what in justice may seem his due.

If the contracts made with the bank are illegal, it follows from the authorities cited, that they may be avoided by plea or relieved against in equity.

But they were illegal, for the contract was in effect that the dealer should give *his note* and the bank *their notes*. His part of the contract is void, if the transaction is illegal. Now, the illegality is clear in itself and is established by Holt's opinion, (x) "that every contract made about any matter or thing which is prohibited is void."

But Mr. Leigh depicts in strong colours, the general ruin which would be produced by the application of these doctrines to so extensive "a disease of the body politic." These evils would not result from the principles for which I contend. They would flow indeed from the chancellor's doctrine of refusing relief against these contracts, and denying to parties even their just credits in their transactions with the banks. But, if dealers with the bank are permitted to enforce their just credits and even to get relief against their whole debts, the few individuals concerned in the banks alone would suffer, and they could not

(t) Ambler, 492.

(u) 1 Brown, 125. 9 Vez. 298. 11 Vez. 536.

(v) 1 Hen. and Mun. Austin and Winston.

(w) 3 Vez. jr. 612.

(x) Carthew, 252. Approved, 1 Taunton, 155.

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justly complain. Thus too, the loss would fall upon the proper person. This system of measures would not be liable to the objection justly imputed to the chancellor's opinion in the case of *Snyder and Dailey*, in which the rule laid down would place unchartered banks in a better situation than others, and enable them to practice frauds by refusing credits.

Here, however, we shall doubtless meet again with the objection, that it is unequal to permit the banks to be sued, but not to sue. But, the diversity is, that we permit suits to vacate the contract, and only reject those which would enforce them. Thus far, the supposed inequality is sustained throughout all the cases cited. We are told, too, that the tendency of the doctrine is to render the vicious circulation more vicious. That danger is not now to be apprehended, for that circulation has entirely disappeared. And as to the future, it never can arise; for, if the court pursues this policy, (so long the policy of the common law,) there never can be another unchartered bank. Men will not be mad enough to lend out money which they cannot recover; and even if such should be found, they could not force their paper into circulation, when every one must see their inevitable bankruptcy in prospect. Had these principles been familiarly known, those banks would never have been created.

Considering that the banks have been composed, in a great degree, of innocent persons, it is indeed matter of consolation to reflect, that the adherence to the principles of the law will produce no extensive ill. They have, with but few exceptions, honorably wound up their concerns.

I come next to the acts of 1816. They may be considered together; for, the last is a mere suspension of the first, and passed on the very day the first had at first been intended to commence. The first act, made with a view to put down the banks, contains superadded penalties and superadded prohibitions also. And this is all it does contain. But, as the penalties were very heavy, and

if they ever attached at all, would forfeit to the commonwealth all the bank funds; the act itself was suspended in its operation, first until November, 1816; and then till August, 1817. There is not a word of the repeal or suspension of the act of 1805. Can this, then, be supposed to be suspended by the mere suspension of the superadded penalties and prohibitions? It would be against every principle of fair construction. If, indeed, there had been a clause suspending the act of 1805, *that* clause would itself have been suspended, as the act was not to *commence* until August, 1817. Thus it could not possibly have had the operation contended for, of suspending the act of 1805, from February, 1816, till August, 1817. But suppose it had. Then during that time there would have been *no* law against emitting private bank notes; or, if the act was to be considered as suspended *only as to these banks*, then *they* might *lawfully* have issued as many as they pleased in the interval. Could the legislature, in passing the act "more effectually to prevent the circulation of private bank notes," have intended this? Impossible!

The act of 1805 was then in full force between the passage of the act of February, 1816, and the month of August, 1817; and if so, the consequences of contracts against its policy must follow.

The preamble of the latter acts is referred to, to shew that the legislature intended to give time. But it has long been settled, that it is not proper to grope amid the darkness of an obscure preamble, for the interpretation of an act plain in itself. The question, indeed, is not about the meaning of the act, which is perfectly plain, but about its *effect* in suspending the operation of a former law. This question is one of judicial principle, not one of interpretation which can be illustrated by the preamble of an act in no wise doubtful.

If I am right, then, in these principles, the case of *McGuire* and *Ashby* should be affirmed, and that of *Sny-*

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der and *Dailey* reversed *in toto*, with directions to perpetuate the injunction for the whole sum ; or, if the court will not go thus far, we must at least have our credits allowed in that case.

Judge ROANE, delivered the opinion of the court :*

WILSON vs. SPENCER.

'This is an action of debt, brought in the county court, by the appellee, upon a single bill. The defendants pleaded two pleas, stating, in substance, that that bill was given to the president of an unchartered bank, established contrary to the provisions of the statutes in such case made and provided, and that it was given in consideration of bank notes, emitted by the said bank, in equal violation of those statutes. These pleas were demurred to, and the facts therein stated, are consequently admitted. The county court gave judgment for the plaintiff, on the demurrer, and that judgment was affirmed by the superior court : from which judgment of affirmance, an appeal was taken to this court.

It is not easy for this court to perceive on what grounds this judgment can be justified : although the act of February 24th, 1816,(y) was not in force, when this bill was given, the act of 1805 was,(z) and the bill was given for a consideration utterly prohibited by that act. It was given for a consideration, prohibited under severe penalties : and the cases cited for the appellant, incontestibly prove, that any contract founded on an act forbidden by a statute, under a penalty, is void, although it be not *expressly* declared to be so ; and that no action lies to enforce it. Whatever might be said, in relation to an action

* The counsel moved for a re-hearing of these causes, and the court, after having had the motion some time under consideration, expressed themselves satisfied with the decision.

(y) 2 Rev. Code, p. 111.

(z) 2 Rev. Code, p. 111, ch. 207, § 2.

brought to recover the amount of the bank notes, given as the consideration of this bill, in favor of the holder against the bank; in favor, as might be argued, of an innocent endorsee, or holder of the said notes; it is clear, that no action will lie, on a bond given to secure the payment thereof, in favor of the bank, the party more emphatically offending against the policy of the act. It is this last mentioned party, who is now asking the court to give its aid to violate the provisions of an act of great public policy and utility. There can be no ground for such a pretension, unless we consider the act of 1805, as repealed at the time, and as having no binding force or authority. In relation to a law of this importance and character, and of such long-standing in our code, we ought not lightly to *imply* such a repeal. It should be shewn to be repealed, either expressly, or by a strong and *necessary* implication. The only ground, on which that inference is attempted to be supported, in this case, arises from the suspension of the act of February 24th, 1816. That act was additional to that of 1805, and created further penalties and forfeitures for its infraction: but it left the act of 1805, in full force.

In making a *further* declaration, in the act of 1816, that notes, bills &c. issued contrary to its provisions, should be null and void, it cannot be inferred, that those made contrary to the act of 1805, are valid. The suspension of the former act does not necessarily carry with it, the *repeal* or *suspension* of the latter: nor did a particular provision of the act of 1816, § 7, specially prohibiting suits, by the banks therein contemplated, interfere with similar prohibitions, resulting on general principles of law, from the inhibitions contained in the act of 1805. A suspension of the act of 1816, therefore, did not suspend, repeal, or interfere with, the provisions of the act of 1805: nor does a recognition contained in the suspending act, of a right in the banks, therein-mentioned, to close their transactions, in conformity with the pro-

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visions of the act of 1816, annul or apply to the prohibitions contained in the act of 1805. That suspension left the banks aforesaid, on the ground they occupied, before the passage of the act suspended; but did not place them in a better situation; and, far less, as was argued, did it legalize and charter those associations. It left those banks free to arrange their matters, if they could, without suit: and unaffected by the severe and additional restraints and penalties, of the act of 1816. It did not mean to interfere with the *original* act, when it only purported to suspend in part *another* act, *more effectually* to suppress the circulation of notes, emitted by unchartered banks. The suspension only operated up to the point, embraced by the last act, and did not go beyond it.

Under the admission, that the prohibition in the act of 1805 is not repealed, the counsel for the appellee *concedes*, that in regard to individual cases, the law would be decided against him: but he claims an exemption for his clients, on the ground of the *extent* of this confederacy to infringe the laws, and of what he is pleased to call, a disease of the body-politic. There may be cases, in which the still voice of the law may not be heard, nor the power of the civil officer be competent to execute its judgments. *That*, however, is an extreme case, partakes of the nature of a revolution, and, in point of magnitude, is not shewn to exist in the case before us. But where would gentlemen draw the line in such cases? We know of no such boundary in the case before us. All that we know, is, that certain associations of individuals have set themselves up, in open violation of the laws, to exercise a high function of sovereignty, at most only confided to the power of the legislature.

We are, therefore, unanimously of opinion, that the judgment, in this case, is erroneous, and that it should be reversed, and entered for the appellants.

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On the general grounds of our decision, in the case of *Wilson vs. Spencer*, we are of opinion to affirm the decree. There is, in principle, no difference between the two cases ; except that, in the present, the interposition is by a court of equity. That court, as well as a court of law, will interfere to prohibit the effect of contracts, made in violation of laws, enacted for the public good. The cases cited fully support this position, and are entirely satisfactory. The decree is to be affirmed.

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SNYDER vs. DAILEY.

The dissolution of the injunction in this case, gives full effect, on the part of a court of equity, to a contract entered into, in open violation of the law. It could only be pretended to be right, to repel the plaintiff from that forum, on the ground that he is equally guilty with the defendant. That principle is not, however, admitted to apply to cases in which the act complained of, is interdicted by the positive provisions of a statute ; and in which the commonwealth, whose policy is thus violated, may be considered as the real party. Besides ; there may not be *par delictum*, in this case. The person who merely takes the notes of an unchartered bank in payment, may not be considered so highly culpable, as the institution which issues them ; and besides, his necessities may have occluded his freedom of will. If this objection does not lie in relation to contracts *expressly* declared void by statute, neither does it, as to such as are conclusively held to be so, by being prohibited under penalties. The cases, referred to in the argument, shew that the contracts are void in the last case, as well as in the first.

We are of opinion to reverse the decree, and perpetuate the injunction.

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**Beverley against Ellis & Allan, and others.**

Where a deed is duly proved or acknowledged, and ordered to be recorded, and left with the clerk for that purpose, it shall be considered as recorded from that time, although it may never, in fact, be recorded, but is lost by the negligence of the clerk or other accident.

Therefore a deed, under such circumstances, will be preferred to a subsequent deed, which has been duly recorded, even although the party to such subsequent deed may not have had notice of the prior deed.

Appeal from the superior court of chancery for the Richmond district.

Peter R. Beverley filed his bill in that court, setting forth, that Carter Beverley conveyed to him a tract of land containing five hundred acres in Culpeper county, by deed of bargain and sale, on the day of January, 1808 ; and on the 18th day of the same month, acknowledged the same in the county court of Culpeper, when the said deed was, by the said court, ordered to be recorded, and was left with the clerk for that purpose ; that before the said deed was actually recorded, it was lost or destroyed by the negligence of the said clerk, and cannot now be found : that after the 18th day of January aforesaid, the said Carter Beverley conveyed the same land to Charles Copland and William C. Williams in trust for the purpose of securing the payment of certain sums of money to Ellis and Allan, merchants : that the said land has been since sold under the said deed of trust, and Ellis and Allan became the purchasers : that Ellis and Allan had notice of the complainant's title, before the sale under the deed of trust aforesaid. He therefore prays, that Carter Beverley and Ellis and Allan may be decreed to convey the said tract of land to him.

Ellis and Allan filed their answer, giving an account of the manner in which the debt arose between them and Carter Beverley : that to secure this debt, the deed of trust

mentioned in the bill was executed : that they had no knowledge or suspicion, that there was any claim or pretended claim whatever by any person or persons to the said land, except the dower right of Mrs. Catlett, and never heard of the complainant's claim, until the land was advertised for sale : that the sale was postponed in consequence of an advertisement in the name of Peter R. Beverley, announcing to the public his claim, and cautioning them against purchasing the land : that they made diligent enquiry in all the offices where the said deed must be recorded, and found that there was no deed for the said land to the complainant, nor any paper shewing him to have any title : that thereupon the land was again advertised for sale, under the trust deed, and another notification was issued by the complainant, like the first ; and at the sale, the defendants became the purchasers, and received a deed from the acting trustee. They therefore conceive themselves to be innocent purchasers, without notice, and for a valuable consideration, &c.

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The deposition of Munford Beverley proves, that Carter Beverley executed a deed to Peter R. Beverley, for the tract of land aforesaid. William Broadus, who was deputy clerk of John Jamieson, clerk of the county of Culpeper, states, that on the 18th day of January, 1808, a deed was acknowledged from Carter Beverley to Peter R. Beverley, as appears by the minute book of the said court, in the hand writing of the deponent. He further says, that he believes, that the said deed conveyed two tracts of land to the said Peter R. Beverley, lying on Mountain Run, in the said county : that, before the said deed was copied into the record book, he believes it was taken from the said office, privately, by some person to him unknown : that a diligent search has been made for it, but it has never been found.

The chancellor dismissed the plaintiff's bill, and the plaintiff appealed to this court.

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Stanard, for the appellant, contended, that according to the act for "regulating conveyances," (a) the appellant had done every thing incumbent on him, to give his deed the privileges of a recorded deed. The condition contained in the law, "and be lodged with the clerk of such court to be there recorded," has been literally complied with. The fourth section of the act must be construed so as to make it consistent with the first. If it should be understood to make the *actual recording* an essential prerequisite, instead of the being *lodged with the clerk to be recorded*, the two sections will be at variance with each other. But, the qualification in the fourth section, "according to the directions of this act," plainly refers to the first section, which declares that it will be sufficient for the party to *lodge the deed with the clerk to be recorded*. When the party has lodged the deed with the clerk, he has done all in his power. The deed is no longer under his control; and it depends upon the clerk, whether it shall be recorded or not. It would be highly unjust to make the party suffer for the negligence of the clerk. If the opposite doctrine shall prevail, the *effectual* recording will depend, not upon the time of acknowledgment, but upon the time when the clerk might find it convenient to record it. This would place the rights of land-holders, upon a very precarious footing.

Wickham, for the appellee, admitted the correctness of the position, that Peter R. Beverley was only required to lodge the deed with the clerk to be recorded. But the deed must be recorded at *some time or other*, to give a party the benefit intended by the act of Assembly. This is the import of the 4th and 8th sections of the act. By this construction, the supposed variance between the 1st and 4th sections is avoided. The first section declares that it will be sufficient to *lodge the deed with the clerk*; the 4th

(a) 1 Rev. Code, p. 157, § 1, old edition.

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section says it must be *recorded*. Both sections must have their full meaning, if it be possible ; and this can only be done by supposing that the legislature meant, that although it is sufficient if the deed be lodged with the clerk, yet that it must be recorded at some time or other afterwards. Here the deed in question *never has been recorded and never can be*. The act is positive and not to be evaded by any reasons of expediency. The minute made by the clerk does not give notice of any particular quantity of land, and the boundaries and situation are left quite uncertain. But upon general equitable principles, the case is with the appellees. They are *defendants* and *innocent purchasers*. Where equity is equal, the parties will be left to their remedy at law. But in point of fact, there is no proof that *this* land was ever conveyed to Peter R. Beverley. Even if this were proved, there was fraud in Peter R. Beverley, in not securing his title by a *lis pendens* ; which might easily have been done, as Ellis and Allan's deed was made two years after the acknowledgment. Besides this, the appellant has a clear remedy against the clerk. He has therefore mistaken his remedy.

Stanard, in reply, enforced his construction of the act of assembly, by referring to the Revisal of 1819, which has inserted in the 4th section of the old act, the words "lodged with the clerk, &c." which explain the meaning of the old act, and remove the whole foundation of Mr. Wickham's reasoning. The assumption that Ellis and Allan are *innocent purchasers*, is nothing but a *petitio principii*. If the acknowledgment of the deed and lodging it with the clerk, is equivalent to actual recording, it is notice to the world, and Ellis and Allan must be affected with that notice. The minute of the clerk gives sufficient notice to a subsequent purchaser to put him upon inquiry. Peter R. Beverley was not guilty of *laches*, because it was not his duty to inquire at the office, whether the deed was recorded or not. As to the argument that the clerk is

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Burnley's administrator against Duke and others.

Where a testator leaves two wills, one in Virginia, and the other in England, the English will being the last in date; and his executor takes out letters of administration on the posterior will, in England; this does not *ipso facto* repeal letters of administration which have been granted in Virginia, on the first will; but the English executor must first qualify by giving bond and security as the law directs.

Quære whether the recording in Virginia, of the exemplification of a will and the probat thereof, in the prerogative court of the Archbishop of Canterbury, without further proof, would authorise the granting of letters testamentary in Virginia?

What acts will amount to a virtual renunciation of an executorship?

The principle of *Granberry vs. Granberry*, (1 Washington,) affirmed.

This suit was originally brought in the high court of chancery, and afterwards transferred to the Fredericksburg district, upon the division of the court.

John Burnley, who had been a resident of Virginia, afterwards moved to Great Britain, and died at sea on his return to Virginia. He left two wills, one dated in 1771, and the other in 1778. The last will was proved in the prerogative court of the Archbishop of Canterbury, and Hardin Burnley qualified as executor, in England. This will was admitted to record in the year 1785, in the county court of Hanover, upon the production of a transcript of the will with the probat thereof, duly certified according to the laws of Great Britain. Before this, however, a will of John Burnley, dated in 1771, had been recorded in Hanover county in 1779, and administration granted in 1782, to Zachariah Burnley, who took upon himself the administration of the estate of John Burnley, in Virginia.

By the will of 1778 (and indeed by both wills) the testator directed his executors to put 600*l.* Virginia currency to interest, and the interest arising to be annually

paid to his sister Elizabeth Duke, and after her decease, the principal to be equally divided between the said Elizabeth's then surviving children. This suit was brought by Elizabeth Duke and her children, to recover of Zachariah Burnley, the amount of their legacies. They alleged in their bill, that Z. Burnley has got the whole estate of John Burnley in Virginia, into his possession, and that it amounts to much more than enough to satisfy all specific legacies, after paying debts; that he has wasted the estate without putting out 600*l.* to interest according to the directions of the will, and has not only refused to pay the said interest for many years, but has also refused to place the principal in such a situation, as would secure the payment of it to the children of Elizabeth Duke, at a future day: that the complainants, seeing the danger of their legacy being lost, agreed among themselves to make partition of it as soon as it could be got, without waiting the death of the said Elizabeth, who is willing to renounce all claim to the annual interest in future, and to receive from her children a compensation, in lieu thereof; of all which they have long ago informed Z. Burnley: they, therefore, pray that he may be compelled to pay to the complainants the legacy with all the interest thereon which may be due, and that he may be required to render an account of his administration.

Z. Burnley says in his answer, that he has paid some of the instalments of interest, and believes that in 1789, he acknowledged by letter, that three years interest were due to E. Duke; but since the date of this letter, sundry evidences of debts due from his testator have come to his knowledge, which have made it doubtful whether there will be sufficient assets to pay debts; that this doubt has produced a suspension in the payment of the interest upon the legacy; that the agreement mentioned in the bill, between the complainants, is not binding on him, as he is no party to it; and submits it to the court, whether the complainants, by their agreement, have a right to take

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the principal legacy out of his hands, in the lifetime of E. Duke; and he expresses his willingness to account.

By an amended bill, the complainants alledge, as new matter: 1st. That Z. Burnley sold a tract of land, part of the estate of John Burnley, deceased, at private sale, to Hardin Burnley, who relinquished his bargain, and then it was sold to B. Temple for 2,000*l.*; which, they alledge, was much less than could have been got for it at public auction. They, therefore, pray that the said Z. Burnley may be compelled to account for the value of the said land at such price as it would have sold for at public auction. [N. B. The deed to Temple is executed by Z. Burnley and Hardin Burnley; the latter of whom signs it, not in the character of executor, but as heir to John Burnley deceased.] 2. That the said Hardin Burnley, (the English executor) had possessed himself of all the estate of J. Burnley in England, and of several bonds, judgments, and other evidences of debts due to the said J. Burnley, in this country, and that he ought not to have received any part of the assets in this country, until he had settled the account of his executorship in England; so as to shew the amount of assets in his hands which might have been applied to the discharge of his claims against the said estate. They state, that the estate of the said J. Burnley in England was fully sufficient to satisfy any demand which the said Hardin Burnley might have against the said J. Burnley: that a certain Edmund Littlepage, of this state, has effects in his hands belonging to the said Hardin Burnley, fully sufficient to satisfy the legacies, bequeathed by the will of the said John Burnley. They therefore make Hardin Burnley and Edmund Littlepage, parties to this suit; and pray, that the former may render an account of his executorship in England, and the latter may disclose what effects he may have of the said Hardin Burnley in his hands, &c.

Hardin Burnley being a non-resident, an order of publication was made against him.

Z. Burnley answers, that it is true that he sold the King-William lands as stated in the amended bill, but verily believes that they were sold for their full value in ready money; that he is ignorant of the state of J. Burnley's affairs in England, but is rather inclined to believe that he was rather a debtor than a creditor in that country; that conceiving that Hardin Burnley acted under an authority superior to his own, he permitted the said Hardin to receive the price of the land from the said Temple, &c.

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Z. Burnley afterwards died, and the suit was revived against Alexander Shepherd, his administrator *de bonis non*.

Upon reference of the accounts to a commissioner, he reported a balance due from the estate of Z. Burnley, greatly exceeding the amount of legacies due to the complainants, under the will of J. Burnley, deceased.

The commissioner also reported a considerable balance against Alexander Shepherd, as administrator *de bonis non* of Z. Burnley, deceased.

Exceptions were filed to these reports by the defendant Shepherd, some of which were sanctioned by the court of chancery and others rejected; whereupon the accounts were again referred, and the commissioner again reported a balance against the defendant, sufficient to satisfy the claims of the complainants.

To this new statement, the defendant Shepherd again filed exceptions; and the court of chancery, upon a hearing, decreed that Alexander Shepherd, administrator &c. do pay to the plaintiffs Elizabeth Duke, Burnley Duke, William Smith and Ann his wife, Reuben Smith and Elizabeth his wife, Richard Keeling Tyler and Mary his wife, and Patsey Duke, four hundred and eighty-three pounds, four shillings, with interest at the rate of *five per cent. per annum*, on four hundred and fourteen pounds, five shillings and eleven pence, part thereof, from the 31st day of December, 1817, until payment; to the plaintiffs

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Keziah Redd,* Cleviers Duke, James Duke and Amy Pet-tus, the sum of five hundred and sixty-nine pounds, eight shillings and one penny, with the like interest on four hundred and eighty-eight pounds, eleven shillings, part thereof, from the 31st day of December, 1817, until payment; and to the plaintiffs **James R. Pannel** and others, five hundred and sixty-one pounds, four shillings and seven pence, with like interest on four hundred and eighty-one pounds, sixteen shillings and eight pence, from the 31st day of December, 1817, until payment; which payments, are to be made to the said parties respectively, upon their respectively entering into bond with good security to the defendant **Shepherd**, in the penalty of double the sum respectively decreed to them, with condition to refund in due and rateable proportions to the said defendant for the payment of any debts which may hereafter appear to be due from the said **John Burnley** deceased, and the costs of recovering the same; and that the said defendant **Shepherd**, pay to the plaintiffs the costs by them expended, &c.

From this decree, the defendant, **Alexander Shepherd**, appealed to this court.

Stanard, for the appellant.

Hay and Call, for the appellees.

March 30th.—**Judge BROOKE**, delivered the opinion of the court:†

The court, not deciding whether the recording in the court of Hanover county of the exemplification of the will of **John Burnley** of 1778, and the probat thereof by **Hardin Burnley** in the prerogative court of the Archbishop

* All the persons whose names follow, were made parties by consent. They claim by clauses in the will, similar to the bequest to **Elizabeth Duke** and her children.

† **Judge Roane** was absent from indisposition.

of Canterbury, without further proof, would have authorised the granting of letters testamentary, to Hardin Burnley, is of opinion that it did not repeal the letters of administration granted to Zach. Burnley upon the previous will of John Burnley of 1771; and that Zach. Burnley was not authorised thereby to transfer the assets of John Burnley in his hands, to Hardin Burnley; he having failed to qualify by giving bond and security as the law directs; and that the said Z. Burnley was chargeable with all the assets of John Burnley which came to his hands, or might have come to his hands, by using due diligence; the more especially, as in this case Hardin Burnley, by omitting to qualify as aforesaid, and also by uniting in the deed for the land directed to be sold by both wills, with Z. Burnley the administrator upon the first will, as heir at law to the testator, and not as surviving executor, virtually renounced that character, and was only entitled as creditor and legatee to receive any portion of the estate of John Burnley; and the court is further of opinion, that applying these principles to the accounts and reports in the record, without deciding on the exceptions of the parties thereto, it does not appear that the estate of Z. Burnley in the hands of the appellant has been charged to a greater amount than was proper; and although the court does not approve of the mode of settling the account of the appellant, being of opinion that the principle laid down in the case of *Granberry vs. Granberry*, (a) is applicable to it, yet the appellant, in the opinion of the court, has no just ground to complain of it, inasmuch as he is credited with 120*l.* with interest to the amount of 21*l.* 12*s.* without producing any vouchers; which is more than equivalent to any error against him. The decree is therefore affirmed.

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(a) 1 Washington, 246.

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Lyne against Jackson, and Lyne against Wilson.

Where a party applies to a court of chancery to prevent the issuing of a patent, or an assignment of a survey, and alleges a fraud committed by the defendant in forging an agreement between him and the complainant, the court of chancery has jurisdiction without the party's resorting to a caveat in the first instance.

During the pendency of such a suit, no person can obtain a patent for the same land under a treasury warrant, located since the institution of the suit; but he will be regarded as a purchaser with notice.

These were appeals from the superior court of chancery for the Richmond district.

John Lyne filed his bill in the high court of chancery against George Jackson and William Martin,* executors of Hezekiah Davisson deceased, William Haymond and the Register of the Land Office, setting forth the following case: that John Lyne the complainant being possessed of certain treasury warrants, entered into an agreement with Hezekiah Davisson, by which it was witnessed, "that the said John Lyne hath this day delivered the said Davisson two land warrants No. 15170 and 15171. "No. 15170 is for eight thousand acres, and No. 15171 is "for eight thousand, seven hundred and 18 $\frac{1}{2}$ acres of land. "The said Davisson for his part doth promise to locate "and survey the said land for the said John Lyne, and to "return plots of the surveys to him, the said Lyne, or to "the register of the land office. As soon as patents issue, the said John Lyne do oblige himself, his heirs, to "assign to the said Davisson, his heirs &c. one half of all "such patented land as shall be by him surveyed for the "said Lyne, the expense of surveying and patents to be "equally divided between the said Lyne and Davisson:"

* William Mauleby and Anne his wife, were afterwards made defendants, the said Anne being one of the executors of Hezekiah Davisson deceased.

which agreement was signed and sealed by both parties : that no adjustment was made between the parties in the life time of the said Hezekiah, whereby to ascertain the part which each was to have of the lands aforesaid, and the complainant did not part with his title in common, in any manner whatsoever, except to that of three thousand acres whereon the warrant No. 15170 was in part laid ; yet the said Hezekiah fraudulently wrote or caused to be written an assignment to himself of the whole of that warrant and forged the signature of the complainant thereto ; and under colour of that fraud, he caused the land to be surveyed for himself : that the said Hezekiah is since dead, leaving George Jackson and William Martin his executors, who have offered the said land for sale, although no patent hath yet issued for the same. He therefore prays, that the said executors may be enjoined from selling the said land and compelled to account with the complainant on the principles of the said agreement, for all warrants by him delivered to their testator : that William Haymond* may be enjoined from delivering the said warrant to any person, till the further order of the court ; and that the register may be enjoined from issuing any patent for the land aforesaid.

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Lyne,
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The injunction was awarded.

William Haymond, by his answer, says, that he believes that the assignment mentioned in the bill, was wholly written by Davisson himself : that the warrant is in his (Haymond's) hands : that it was delivered to him by the said Davisson for the purpose of being surveyed ; by virtue of which he hath caused five thousand acres to be surveyed for the said Davisson ; and that he does not intend to deliver it to any person until the further order of the court.

The executors say in their answers, that they know nothing of the alledged fraud : that they have never of-

* The surveyor of Harrison county.

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ferred any of the said lands for sale : that the complainant has himself been in default, 1st because they believe that their testator has borne *all* the expense of the locations and surveys, and the complainant has never refunded his proportion of the same, and 2ndly because the complainant has not conveyed a moiety of the said lands to their testator. They therefore hope, that the complainant may be compelled to make such division and to execute conveyances accordingly, and account for his proportion of the expenses of the locations and surveys in execution of the said articles of agreement.

Upon the death of John Lyne, the suit was revived in the names of William Lyne his executor, and the said William Lyne and William Lyne, jr. his devisees ; and upon the death of the latter, it was revived by his executors and devisees.

Depositions were taken, which clearly prove that the assignment in question was wholly written by Hezekiah Davisson, and establish all the material allegations of the bill.

The same complainants afterwards filed a supplemental bill against Benjamin Wilson jr., Daniel Davisson and the Register, charging, that pending the suit against Davisson's representatives, the said Wilson had procured a warrant for five thousand acres, which he had laid on the land in controversy, and having had a plat and certificate of survey returned to the Register's office, will obtain a patent for the same, unless prevented by the interposition of a court of chancery : that the complainants were ignorant of this fraudulent attempt until informed of it by a letter received by the last mail : that the first survey being in the name of Hezekiah Davisson by virtue of the forged assignment aforesaid, and all the subsequent proceedings being in the name of the said Hezekiah, the complainants cannot resort to the remedy by caveat against a grant to the said Benjamin Wilson, with any hope of success. They therefore pray, that the register

of the land office may be enjoined from issuing a patent to the said Benjamin, on the said plat and certificate of survey, &c.

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The court granted the injunction.

The defendants Wilson and Davison admit, that the defendant Wilson did enter and locate a warrant for 5000 acres, and the same was surveyed on the 10th of September 1815, on a certain tract of land in Harrison county, containing 4710 acres ; a part of which survey is included in Lyne's survey, assigned to Davison : that the defendants do not admit that the said assignment was forged or unauthorized, and require proof thereof if the same should become material in this cause ; they then urge several legal objections to the objects and proceedings of this suit.

The chancellor decreed, that the said suits be dismissed, the complainants having a remedy at law by caveat.

The plaintiffs appealed to this court.

Upshur and *Wickham*, for the appellants.

Gilmer, for the appellees.

For the *appellants*, it was said, that a *caveat* could not afford complete relief, and a court of equity had jurisdiction, because one object of the bill was to enjoin the defendants from disposing of the land. Lyne's object was moreover to obtain a conveyance of an undivided moiety. This could not be accomplished by *caveat*. There can be no doubt of the fraud committed by Davison.

The counsel for the *appellees* contended, that the court of chancery had no jurisdiction. There are but two cases in which a court of equity has jurisdiction in a question of *caveat* ; 1, where a new case is made which could not be introduced on a *caveat* ; 2, where a party is prevented by fraud from obtaining a *caveat* : Neither of these

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cases is made out. Every objection which is now made, might have been as well urged at the trial of a *caveat*. No discovery is sought from the defendants; the evidence is entirely *aliunde*; and that evidence might have been brought out with full as much effect on a *caveat* as in a chancery suit. As to the second ground, there is not even a surmise, that the complainants were prevented by fraud from obtaining a *caveat*. In short, this case comes within the spirit and letter of the cases of *Johnson vs. Brown*,^(a) and *Noland vs. Cromwell*.^(b) The case of *Currie vs. Martin*,^(c) does not apply, because here the appellant could prove his title to the warrant. A *lis pendens* can only exist where the parties have a title to the subject in controversy. The original entry in this case was so vague, that it would not give any notice to a locator of the adjacent residuum.^(d)

In reply it was said, that the principle in *Noland vs. Cromwell*, ought to be restricted to cases falling *precisely* within the circumstances of that case. Davisson was a mere trustee, and a court of equity ought, upon well known principles, to enforce the due execution of the trust. *Fraud* is another head of equitable jurisdiction, which would equally sustain the jurisdiction in this case. In addition to this, there was an original right to come into a court of equity, to obtain a partition; an object which could not be attained by a *caveat*. The *caveat* law does not take away an original equitable right. The case of a surety who has a summary remedy against his principal, is an illustration of this doctrine. The case of *Christian vs. Christian*^(e) is a conclusive authority in our favor. The law limiting a time within which a survey must be made was repealed by a subsequent law. As

(a) 3 Call, 259.

(b) 4 Munf. 155.

(c) 3 Call, 23.

(d) 1 Call, 306, *Hunter vs. Hall*. 1 Munf. 300, *Depew vs. Howard*. Judge Tucker's opinion.

(e) 6 Munf. 534.

to the survey not being conformable to the entry, this question was not before the chancellor. He decided on the point of jurisdiction only. The survey is consistent with the requisitions of the law.

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Judge BROOKE, delivered the opinion of the court :*

The court is of opinion, that the appellants properly came into a court of chancery for the relief prayed in the original bill, against the representatives of Hezekiah Davisson, and also for the relief sought by the supplemental bill against James Wilson and Daniel Davisson, and that the register of the land office was a proper party in both cases, to effectuate the relief to be decreed them. The object of the original bill was, to prevent the issuing of a patent by the register on the survey of the lands in controversy, or an assignment thereof by the representatives of the said Davisson ; and of the supplemental bill, to prevent Wilson or those who might claim under him, from getting a patent for the same land, before the controversy between the parties to the first bill, was adjusted. The decree of the chancellor dismissing both bills for want of jurisdiction is therefore reversed, and the court, proceeding to render such decree as the chancellor ought to have made, is of opinion, that the assignments of the warrant by H. Davisson to himself was not authorised by the agreement with Lyne, in the proceedings mentioned, nor had he a right to survey the land in his own name, on the entry made by virtue of that warrant. The court is further of opinion, that the appellees Wilson and Daniel Davisson are to be considered as having notice of the rights of Lyne from the filing of the original bill, and probably on the facts in the case, had express notice thereof : that these rights are to be affected by that notice, and must yield to the claims of the appellants. It is therefore decreed and ordered, that upon the appellants

* Judge Roane absent from continued indisposition.

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producing to the register of the land-office a copy of the survey made on the 14th day of August 1785, in the name of the said Davisson, he make out or cause to be executed to them a patent in due form of law, for the land comprehended within the lines of the said survey, to be held by the said appellants, subject to the just claims of the representatives of the said Davisson to any part thereof under the said contract ; and liberty is reserved to them to resort to the court of chancery for a full and final settlement of all accounts and claims under the said contract. And it is further decreed and ordered, that the appellees Wilson and Daniel Davisson and the register, be perpetually enjoined from taking out or issuing any patent on the survey in the name of the said Wilson, dated on the 10th day of September, 1815.

Roberts's administrator against Cocke, executor of Thompson.

1892.
April.

Where A borrows money of B, to be repaid on a given day, and delivers to B, a negro man, declaring by a writing that the negro is so delivered "in order to pay the interest thereon and to secure the payment of the principal" at the time stipulated, &c. "the labor of the said negro to be for the interest of the money, and if the said A shall fail to repay the said sum of money on or before" the day stipulated, "then the said B, is to have a good title in fee simple to the said negro. If the said negro shall die before" the day stipulated, "it is to be the loss of the said A;" the court were divided whether this instrument should be considered a mortgage or conditional sale; one judge regarding it as a mortgage; another considering it as a mortgage upon its face, but rendered a conditional sale by the attendant circumstances; and a third viewing it as a conditional sale.

Qu. What shall be considered an adversary possession?

It is error in the chancellor to refuse an application to open an interlocutory decree, founded upon affidavits of a discovery of important matter since such decree was rendered.

William Thompson filed his bill in chancery, in the county court of Halifax, against Henry E. Coleman administrator of Daniel Roberts deceased, stating, that in the year he (the said Thompson,) borrowed of Daniel Roberts deceased, the sum of 100*l.*; and to secure the payment thereof and to pay the interest, he put a certain negro man named Jerry, in pawn or pledge with the said Daniel Roberts; that the said Thompson not being able to redeem the said negro at the time appointed, was obliged to leave him in the possession of the said Roberts: that Roberts is since dead and Henry E. Coleman has administered on his estate: that the hire of the said negro is worth 20*l.* per year, and amounts to a sum sufficient to discharge the debt and interest aforesaid, and leave the said Coleman administrator as aforesaid, indebted to the said Thompson: that the said Coleman in his representative character, has refused to account with the complai-

1822.
April.

Roberts's
adm'r.
vs.
Cooke,
exor. &c.

nant and to deliver up the said negro man, pretending that the complainant has not a right to redeem him. He therefore prays, that the defendant may be compelled to set forth the title by which he withholds the possession of the said slave; whether he has not an instrument of writing in his hands containing the contract aforesaid; that he may deliver the said slave to the complainant, and account for his hire, &c.

Coleman, in his answer, says, that as administrator he took possession of the personal estate of Daniel Roberts deceased, among which was the slave Jerry: that he retained peaceable possession of the said slave, until the day of _____, when in obedience to an order of the county court of Halifax, he delivered the said slave and all the other personal property of his intestate, into the possession of commissioners, to be divided among the wife and children of the said Daniel Roberts deceased; that the said slave was allotted to the children and delivered to their guardian, who has retained possession ever since, as the respondent believes, without any demand being made on the part of the complainant, until the commencement of this suit, or a very short time before; that before the institution of the suit he had fully administered the assets of his intestate, except three bonds, due from the guardian of the orphans: that he knows nothing of the origin of his intestate's title to the said slave, and before he delivered up the estate as aforesaid, he had no notice of the complainant's claim; that among the papers of his intestate, he found an instrument of writing, purporting to be a conveyance of a slave named Jerry from the complainant to his intestate; that this paper purports upon its face to be a conditional sale and not a mortgage; that his intestate and those claiming under him, have had adverse possession of the said slave, from the 1st day of March, 1798; by which the complainant's claim (if he ever had any) is barred by the act of limitations, &c.

The writing mentioned in the foregoing answer, is in

these words: "William Thompson junior, borrows of
 " Daniel Roberts, the sum of one hundred pounds to be
 " repaid on or before the first day of March next. The
 " said William Thompson, in order to pay the interest
 " thereon and to secure the payment of the principal at
 " the time stipulated, doth deliver to the said Daniel
 " Roberts, a negro man named Jerry. The labor of the
 " said Jerry, to be for the interest of the money; and if
 " the said William Thompson, shall fail to re-pay the
 " said one hundred pounds, on or before the first day of
 " March next, then the said Daniel Roberts is to have a
 " good title in fee simple to the said negro. If the said ne-
 " gro shall die before the said first day of March, it is to be
 " the loss of the said William Thompson. This agree-
 " ment entered into the 23rd day of August, 1797, and
 " signed in presence of John B. Scott, William Roberts
 " and John Clarke."

1802.
 April.

Roberts's
 adm'r.
 vs.
 Cooke,
 exor'r. &c.

(Signed) "WILLIAM THOMPSON, junr." (seal.)

The complainant afterwards, by an amended bill, made
 the widow and infant children of Daniel Roberts deceased,
 parties to the suit, and prayed that they might say how long
 the said negro Jerry has been in their hands, and that
 they might account for his hire during their possession.

The new defendants say in their answer, that they have
 been in peaceable and quiet possession of the said slave,
 and have used him as their own property, for near four-
 teen years; and they therefore rely on the statute of limi-
 tations, as being a complete bar to the complainant's
 claim.

Many depositions were taken to prove the declarations
 of the original parties respecting the nature of the con-
 tract; the sums of money for which the slave had been
 hired while in the possession of Roberts; that the money
 was tendered by Thompson a few days after the stipulated
 time, and refused by Roberts, because the sale had be-
 come absolute by Thompson's failure to pay the money at
 the day appointed; the value of the negro, &c.

1822.
April.

Roberts's
adm'r.
vs.
Cocke,
exor. &c.

The county court dismissed the bill, and an appeal was taken to the superior court of chancery for the Richmond district.

The chancellor decreed, that the appellant had a right to redeem the said slave upon the payment of the principal money, with interest, and to have an account of his profits; since, the time which has elapsed, is no bar to the same. For which reasons he reversed the decree of the county court; and retaining the cause, by consent of parties, he decreed that the appellees render an account of the profits of the said slave, since he came to the possession of the said Daniel Roberts deceased in his lifetime, before one of the commissioners of the court; and that the defendant Coleman, should render an account of his administration of the estate of his intestate.

The suit abating by the death of the complainant, was revived in the name of John R. Cocke, as his executor.

The commissioner reported a balance due the complainant of \$1,437 38; and that Henry E. Coleman, was indebted to the estate of Daniel Roberts deceased, in the sum of \$1,222 03.

The defendant Coleman presented a petition to the court for a re-hearing, accompanied with two affidavits, stating that since the interlocutory decree was pronounced, he had discovered new and important testimony, of which he had no knowledge when the decree was rendered; that he expects to prove, that after the time had expired within which the said William Thompson, by agreement, should have redeemed the said negro, the said Thompson, in consideration of the sum of ten pounds paid by Daniel Roberts, agreed to release all claim to the said negro Jerry; which sum was accordingly paid. But this petition was over-ruled by the court, because the matter set forth in the said petition and affidavits was not stated with sufficient certainty. Whereupon the chancellor decreed, that the said defendant Coleman should pay \$1,222 03 cents, being the amount of assets reported to be in his hands,

with interest on \$737 46 cents from the 2nd of January last until paid; and that the other defendants should pay to the plaintiff the sum of \$215 35 cents being the balance of principal money for hire, with like interest from the 15th day of October, until paid.

1892.
April.

Roberts's
adm'r.
vs.
Cooke,
exor. &c.

From this decree, the defendants appealed to this court.

Leigh, for the appellants.

Hay, for the appellee.*

April 5—Judge COALTER :

There are two questions presented by the record in this case; 1st. Was the transaction in the nature of a mortgage, or a conditional sale? 2nd. If the former, or if there is a doubt on the subject, ought the party to be permitted now to redeem, under all the circumstances of the case?

I think there is at least considerable doubt as to the real intention of the parties, and the true nature of the transaction; especially when the peculiar provisions of the written instrument are taken in connection with the contemporaneous and subsequent conduct of the parties.

Upon the face of the writing alone, this case is perhaps more like a conditional sale, than that of *Chapman and Turner*. In both cases, the labor was to stand for the interest until the day of re-payment, when the principal alone was to be returned. In both, the value of the property was little more than the money advanced. In this case there was, perhaps, less inequality than in that. But in this case there is this peculiar feature; the contract provides expressly that in the case of the death of the

* It is unnecessary to give the argument in this case, as it was discussed by the court, and as the opinion of the court only embraced some of the points made in the argument. The cases referred to at the bar, were *Chapman vs. Turner*, 1 Call 380, Judge Roane's opinion; on the point of adverse possession, 1 Call 419, *Harrison vs. Harrison &c.* and *Diekey vs. Dickenson &c.* (not reported) decided February 19, 1819; 4 Mun. 504, *Garland vs. Enos*; as to interest on hire, *Bland vs. Baird*, 5 Mun.

1882.
April.
Robert's
adm'r.
vs.
Cook,
exor. dec.

slave, before the day of re-payment, the loss was to fall on the party who received the money ; the necessary implication from which is, that if he died after the day, he died the property of the other party, who it was said was then to have the fee. This risque is incompatible with the idea of a mortgage, and is one which, considering it as a mortgage, a court of equity would either have to relieve against, as altogether unconscionable ; or if that court could not annul this part of the contract, at least when applied to for permission to redeem, it could well say to such application, especially after a great lapse of time ; “ this condition imposed a risque against which “ you cannot indemnify, and as redemption is permitted “ on the ground that you can indemnify, it will be denied “ in this case.”

Whether we consider it a conditional sale or a mortgage, neither party expected a redemption after the day ; otherwise, this risque would no more have been thrown on the party after, than before, the day.

In the case of *Chapman and Turner*, the answer explained the nature of the transaction, so as to change it from what it might otherwise have appeared from the writing. Had Turner been dead, that case would perhaps have been considered a mortgage, to the ruin of this family, when in truth it was no such thing.

But the doubt here, arising from the paper itself, is not removed, but increased, by the cotemporaneous acts of the parties, and the long acquiescence. Some time after the day of payment, the party either offered the money, believing that he had a right then to redeem ; or thinking he had no such right, unless the other would agree to it, held a conversation with him on the subject, and finding he would not, never offered the money.

I think from the evidence, that this latter was most probably the fact. If so, how can we say whether this opinion arose from a knowledge that it was a conditional sale, or from a mistaken idea, that though if it was a

mortgage, he had no right to redeem after the day ; and especially when the property was to be thenceforth at the risque of the mortgagee ? for, if the slave had died the next day, he having refused the money, no court would have decreed it to him, as his declaration united to the acquiescence of the other party, would, in that event, have forever stamped upon the transaction, the character of a conditional sale.

1838.
April
Robert's
adm'r.
vs.
Carter,
ex'r. &c.

But if he thought it a mortgage, and that he had a right to redeem, he was apprized of the opposite construction, and acquiesced therein, until after the death of the party. He either did so, because, having received a good price for his slave, he was unwilling to risque a suit ; or he intended, at some future day, when, if the slave lived, his hires might amount to, or exceed the debt and interest, to bring his suit to redeem ; well knowing, that should the slave die in the mean time, it would be no loss to him, but to the other party. If he really intended to abandon his right to redeem, if he had it, I can see no reason why, under all the circumstances, he should now be permitted to re-assert it, especially, as before stated, he cannot make compensation for the risque run as aforesaid. And if he never intended to abandon, but merely lie by, to take all advantages and throw every risque on the other party, I think such unfair conduct ought not to make him a favorite of a court of equity.

I well recollect that such conduct, unaccompanied too by any stipulated risque, as in this case, had great weight in turning the scale in the case of *Dickey* and *Dickenson*.(a) Circumstances of this kind, if not decisive of the question of conditional sale or not, are at least well calculated to create doubts upon that subject ; and when doubts exist, or where to permit redemption would be hard and unconscionable, as in this case, they at least afford good ground to conclude that the right to redeem was

(a) See the last note.

1892.
April.

Roberts's
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exor. &c.

waived ; especially when the money advanced was a reasonable and adequate price for the property. For these reasons, I am for reversing the decree of the chancellor and affirming that of the county court.

Were I of a different opinion, I think the decree ought to have been opened to admit the new matter of defence stated in the petition for that purpose.

Judge CABELL :

There is no particular form of expression which will necessarily determine a conveyance to be a mortgage, or a conditional sale. It must always depend on the intention of the parties. In the total absence of all extraneous circumstances, the instrument must be judged of by itself. But an instrument which, in its form, imports to be an absolute conveyance, may be determined to be a mortgage, whilst another, importing on its face to be a mortgage, may be determined to be a conditional sale, according to the intention of the parties, as evinced by testimony *aliunde*. *Ross vs. Norvell*, (b) affords an instance of the former ; and *Chapman vs. Turner*, (c) affords an instance of the latter. If the instrument now before us were to be judged of by itself, abstracted from the circumstances detailed in the evidence, I should be of opinion that it is a mere mortgage. According to its terms, it is a borrowing of money. Nothing is said about the sale or the price of the negro. He was received by Roberts as a security for money borrowed. His labor was to be for the interest of that money, and his life was to be at the risk of the borrower until the day appointed for re-payment of the principal. It is unquestionably true, as contended by Mr. Leigh, that on default of payment at the day, the parties intended the risk to be thereafter on Roberts. That was the necessary result of the declared intention of

(b) 1 Wash. 14.

(c) 1 Call, 280.

the parties, that after such default, the negro was to become the property of Roberts. But that may have been intended as a mere forfeiture, or as a restriction on the right of redemption; which, if the transaction be really a mortgage, equity will not tolerate. Such is the opinion which I should form on the instrument itself.

1892.
April.
Roberts's
adm'r.
vs.
Cooke,
exor. &c.

But the circumstances exhibited in the testimony are not such as to justify the interference of a court of equity. Notwithstanding the form of the instrument, the parties may have intended a sale and not a security; and the sum advanced by Roberts may have been the agreed price of the negro. The testimony shows it was not more than his fair value. But, as both parties intended that Thompson might, and as both of them, probably, expected that he would, regain the negro by repaying the price within the short period allowed for that purpose, (in which event the practical operation of the transaction would rather resemble a loan than a purchase,) it is not surprising that, regardless of technical language, they gave to a contract which was really a purchase, the forms of a loan. It is in proof that the money not being repaid at the day, Roberts refused to receive it thereafter, and claimed the negro as his own. This could only be justifiable, in law, on the ground of the transaction having been intended by the parties as a sale and not a mortgage. Thompson, with the full knowledge of this pretension on the part of Roberts, silently acquiesced in that pretension for more than ten years. We cannot suppose so long an acquiescence proceeded from ignorance that the law authorised him to enforce a redemption, in case the contract had been no more than a mortgage. This acquiescence, when taken in connection with the fact, that, although Roberts survived the transaction for many years, he was permitted to die before the suit was brought, cannot, according to the evidence in this cause, be satisfactorily accounted for on any other consideration than a conviction on the part of Thompson, that Roberts had it in his power, by shew-

1892.
April.

Roberts's
adm'r.
vs.
Cooke,
exor'r. &c.

ing the real character of the transaction, effectually to oppose his demand. Under such circumstances, every thing that can fairly be presumed, ought to be presumed against the complainant. I am therefore of opinion, on the merits, to reverse the decree of the chancellor, and to affirm that of the county court.

But, if my opinion on the merits, as disclosed by the evidence exhibited in the record, had been different, I should still have thought the court of chancery erred in refusing to open the interlocutory decree, so as to allow the appellants the benefit of the newly discovered fact stated in the petition of Roberts's administrator.

Judge BROOKE :*

Upon the face of the contract in this case, it was a pledge or pawn of the slave Jerry, and not a conditional sale. There is nothing in it that intimates a price to be given, which is essential in a sale. The expression in the contract, that if the said negro died before the first day of March next, it is to be the loss of the said Thompson, means nothing more than what would have been the effect of an irredeemable forfeiture, which, though intended by the parties, a court of equity will not permit. The object was to borrow money; and the slave was delivered to the lender to keep down the interest until the day of payment. The fact proved, that the value of the property and the money lent, were nearly equal, does not affect the case, as no treaty for a sale is proved. The inference from the fact, that Thompson tendered the money a short time after the day of payment, is against the idea that he considered it a conditional sale; though that is somewhat accounted for by the fact, that he was absent on a journey, at the day of payment. However that may be, the refusal of Roberts to receive the money, on the

* Judge Roane absent, from the continuance of that cause which has for so long a time deprived the public of his important services.

ground that it was a sale, was full notice to Thompson, that his right to redeem was denied by Roberts; and though I am not prepared to say, that the possession of Roberts was thereby converted into an adversary possession, to which the act of limitations would apply. I am of opinion, that Thompson ought to have asserted his right at an earlier day; and that it would be unjust after the lapse of thirteen years, and after the death of Roberts, to permit him to redeem. I think, therefore, that the decree of the chancellor ought to be reversed, and the decree of the county court affirmed.

1892.
April.

Roberts's
adm'r.
vs.
Cocks,
exor. &c.

**Burwell and others *against* Corbin and
others.**

1892.
April.

A decedent leaves a will conveying real estate, wholly written by another and signed by that other with the name of the testator. There are two subscribing witnesses to this paper; one of whom saw the signature and heard the testator acknowledge that it was signed by his authority; the other does not say whether the paper was signed or not at the time of his attestation, the testator merely declaring "it is my will;" it was held that such a paper was not proved according to the requisitions of the statute. A man who is made a *prochein ami* to an infant without his knowledge or consent, is not disqualified from being a witness; but *quere*, what shall amount to a recognition by such *prochein ami*, that his name was properly used?

This suit was originally brought in the Williamsburg chancery court, and afterwards removed to the Fredericksburg district.

Bacon Burwell and others,* heirs at law of James B. Burwell deceased, of Richmond county, filed their bill

* The infant plaintiffs prosecute in the name of William Bell, their next friend,

1892.
April.

4 Burwell
and others,
vs.
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in chancery against John R. F. Corbin, Thomas P. Smith and Francis Smith, stating : that since the death of the said James B. Burwell, the said Corbin had produced a pretended paper-writing as the last will of the said James, whereby the greater part of his estate is devised away from the relatives and friends of the deceased and left to the said Corbin ; and legacies are bequeathed to the said F. Smith and Thomas P. Smith : that the said paper is wholly feigned and counterfeit : that the said paper has been exhibited by the said devisees to the county court of Richmond for probat, and being proved by the two attesting witnesses, has been admitted to record, and letters of administration granted to the said John R. F. Corbin : that the witnesses aforesaid were perjured : that the complainants being only relievable in equity, they pray that an issue may be directed to try whether the said paper is the true last will of the said James B. Burwell deceased, &c.

John R. F. Corbin says in his answer, that some time before the death of James B. Burwell, he had been induced by strong persuasions and warm professions of friendship, to reside with the said Burwell ; and during this time, he transacted most of the business of the said Burwell : that some short time before the death of the latter, he requested the defendant to write his will ; which he accordingly did, in exact conformity to the instructions of the said Burwell : that upon perusing the said will, the said Burwell expressed his entire approbation of it, and requested the defendant to sign his name for him, to the same : that it was attested by two credible witnesses, who subscribed their names in the presence of the said Burwell : that he denies the fraud, combination, and forgery charged in the bill : that the said will was established in the county court of Richmond, although it was opposed by the strenuous efforts of the complainants, to invalidate the act and stigmatize the character of the defendant : that although the complainants are the nearest relations of the said Burwell, yet the defendant is not

very remotely allied to him in blood ; that as to one of the complainants (Lucy Clements) the testator had always manifested a rooted aversion to her, &c.

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Francis Smith denies his participation in any fraud or combination ; that he was not privy to the execution of the will, and did not know of the existence of such an instrument, until after the decease of the said Burwell, &c.

The paper in question, purporting to be a will, is attested by Thomas I. Scrimger and David Barrick, as subscribing witnesses.

Many depositions were taken on both sides, embracing a great variety of matter, and impeaching and supporting the character of Barrick, one of the subscribing witnesses.

The court of chancery ordered an issue to be made up and tried in the superior court of law for the county of Caroline, "whether the writing produced and referred to in the bill of the plaintiffs, bearing date the 2d day of September, 1811. purporting to be the last will and testament of James B. Burwell, deceased, be the will of the said James B. Burwell or not ; the verdict of which jury, when rendered, shall be certified to this court ; and the court doth decree and order, that upon the trial of the said issue, copies of the bills, answers and exhibits, and depositions of such of the witnesses as are dead, or cannot attend the trial, shall be read in evidence."

William Ball, the next friend of some of the infant plaintiffs, being dead, Bacon Burwell was admitted to prosecute the suit as their next friend.

The issue directed by the court, was accordingly made up in the usual form, and tried in the superior court of law for Caroline county.

The jury not agreeing on their verdict, it was agreed by the parties, "that the question of law arising on the evidence of the subscribing witnesses to the paper-writing in the declaration mentioned, purporting to be the will of James B. Burwell, in the event that that evi-

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“ dence should be credited by the jury, to wit: whether
“ that evidence shows that the said paper-writing was
“ duly executed as a will, according to the first section of
“ the act of the general assembly, passed the 18th day of
“ December, 1792, entitled ‘an act reducing into one
“ the several acts concerning wills, the distribution of in-
“ testates’ estates, and the duty of executors and adminis-
“ trators,’ shall be reserved by a special finding of the
“ facts that the jury may determine to be proved by that
“ evidence by the jury, to be decided by the proper court ;
“ and all parties agreeing to waive all objection, now and
“ hereafter, that might be made to any irregularity or
“ supposed irregularity in this course.”

The jury being sent out, returned a virdict in these words :

“ We of the jury find that the paper-writing in the
“ proceedings in this cause mentioned, bearing date the
“ 2nd day of September, 1811, purporting to be the last
“ will and testament of James B. Burwell, deceased, is
“ the true last will and testament of the said James B.
“ Burwell, deceased, in the proceedings in this cause men-
“ tioned, if the proper court shall be of opinion that the
“ said paper-writing was duly executed as the last will
“ and testament of the said James B. Burwell, deceased,
“ upon the following facts, which we find: that on the
“ 2nd day of September, 1811, the said James B. Bur-
“ well requested Thomas I. Scrimger, a subscribing wit-
“ ness to the said paper-writing, to call at his house that
“ evening on his way from Richmond court, as he (Bur-
“ well) had particular business with him ; that the said
“ Scrimger was detained at Richmond court-house by a
“ thunder storm, and did not call at the said Burwell’s
“ that evening ; that the next morning, the 3rd of Septem-
“ ber, 1811, a messenger came from the house of the said
“ Burwell to the said Scrimger, to know if he had gotten
“ home ; and the said Scrimger, on the morning of that
“ day, went to the said Burwell’s house, and there found

“ the said James B. Burwell and John R. F. Corbin, a
 “ defendant in equity in this suit, together; when, after
 “ the said Scrimger had spoken to the said Burwell and
 “ Corbin, the said Burwell gave a paper-writing to the
 “ said Corbin, and requested him to hand it to the said
 “ Scrimger, that he might sign it as a witness; that the
 “ said Corbin took the said paper-writing, and observed
 “ to the said Burwell, that he had not signed it himself,
 “ when the said Burwell observed, ‘ aye, you can sign it
 “ for me;’ whereupon the said Corbin, in the presence
 “ of the said Burwell, signed the name of the said James
 “ B. Burwell to the said paper-writing, and then deliver-
 “ ed the said paper-writing to the said Thomas I. Scrim-
 “ ger; who, in the presence of the said Burwell, signed
 “ his name to the said paper-writing as a witness; that
 “ the said paper-writing was then delivered by the said
 “ Corbin to the said Burwell, who put it into a small
 “ pocket-book, and put the book into his pocket; that the
 “ said Thomas I. Scrimger, when he returned the said
 “ paper-writing to the said Corbin, in a low voice, in the
 “ presence of the said Burwell, asked the said Corbin
 “ if that paper was the said Burwell’s will, when the said
 “ Corbin answered that it was; but the witness did not know
 “ that this enquiry and answer was heard by Burwell;
 “ that the said Thomas I. Scrimger, at the time of his
 “ signing the said paper-writing as a witness, enquired
 “ in the presence of the said Burwell, if there was to be
 “ no other witness; when the said Corbin answered, in
 “ the presence of said Burwell, that David Barrick had
 “ been sent for, but was not at home; and we find fur-
 “ ther, that the said David Barrick, having returned
 “ home at night on the 3rd of September, 1811, was in-
 “ formed by his wife that the said Burwell had sent for
 “ him in the course of that day: that the said Barrick
 “ went to the house of the said James B. Burwell on the
 “ morning of the 4th of September, 1811, and found the
 “ said James B. Burwell sitting on the bed with the said

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" paper-writing in his hand, when the said James B. Burwell asked him to sign that paper, and the said David Barrick thereupon signed his name to the said paper-writing as a witness, in the presence of the said James B. Burwell: that the said Barrick then asked the said Burwell, what it was that he had signed, and the said Burwell replied 'it is my will, but you need not make a talk of it; it is time enough;' and that the said paper-writing, so attested or signed by the said Scrimger and Barrick, is the same which was admitted to record in the county court of Richmond on the 4th day of November, 1811, which is referred to in the proceedings and issue in this cause; and that the said James B. Burwell, at the time of the attestation of the said paper-writing by the said Scrimger and Barrick, was of sound mind and disposing memory; and if the court shall be of opinion, that the said facts do not shew that the said writing was duly executed according to the directions and provisions of the 1st section of the act of the general assembly, passed the 19th day of December, 1792, entitled 'an act reducing into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators,' then we find that the said paper-writing is not the last will and testament of the said James B. Burwell, so far as it affects the real estate of the said decedent James B. Burwell."

Upon this verdict, the court "being strongly inclined to think that it is not necessary, and perhaps not proper, that this court should give any opinion on the facts found by the jury on this issue, was about to certify the verdict without giving an opinion, but it being suggested by the counsel, that possibly the chancellor may think that this court ought to certify its opinion, and if so, that great delay would arise to the parties from sending it back to this court, for this reason the court proceeds to pronounce its opinion, and the parties being

“ heard by their counsel, it seems to the court here, that
“ the paper-writing in the verdict mentioned is the last
“ will and testament of the said James B. Burwell de-
“ ceased, duly executed as a will according to the first
“ section of the act of the general assembly, passed the
“ 18th day of December, 1792, entitled ‘ an act reducing
“ into one the several acts concerning wills, the distribution
“ of intestates’ estates, and the duty of executors and ad-
“ ministrators;’ and it is ordered, that the verdict of the
“ jury in this issue, and the opinion of this court, be
“ certified to the superior court of chancery for the Freder-
“ icksburg district.”

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At the trial the plaintiffs tendered a bill of exceptions which was received, stating, that the defendants in the issue (who were the plaintiffs in the chancery suit) offered in evidence a deposition of William Ball duly taken in this cause; which William Ball was admitted to be the same William Ball who is named in the bill, as the next friend of Edwin, James and Nancy Burwell, infant children of James Burwell, (who are among the complainants in equity,) and that the said William is now dead. But the plaintiffs in the issue objected to the said deposition being read, because the said W. Ball was named in the bill as the next friend of the said infant complainants, and so was at the time of taking his deposition, interested in the cause, being liable for costs; although it was stated in evidence by the counsel who drew the said bill, that he drew it, and used the name of the said William Ball as next friend, without consulting him, or being authorised by him so to use his name; nor so far as he knows or believes, was the said William Ball, at any time prior to his said deposition, being taken or at that time, apprized, or had he any knowledge of the fact, that his name had been so introduced in the said bill; though he cannot say, that he was not apprized of the fact in some other way, which objection to the deposition being read, was sustained by the court, and the same was excluded.

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The verdict being certified to the court of chancery, that court was of opinion that the paper-writing in the proceedings mentioned, was the last will and testament of James B. Burwell deceased, and accordingly dismissed the bill.

The complainants obtained a supersedeas from this court. In their petition they assign three errors: 1st, that the issue was directed to be tried in the superior court of Caroline county, in which county neither the lands lay, nor the testator died: that the issue *deviseavit vel non* is local and ought not to be tried out of the proper county, but for good cause shewn on the record: 2nd, because the deposition of William Ball was rejected: 3rd, because the will was not duly executed. The two last objections only were relied on in the argument or discussed by the court.

The case was argued in this court at great length by *Leigh* and *Wickham* for the appellants, and *Tucker*, *Standard* and *Call* for the appellees; but as the case received an ample discussion from the court, the arguments of counsel are omitted.

April 10th.—Judge COALTER:

It would be unnecessary in this case to decide, whether the deposition of Ball was properly rejected, if the court was unanimously of opinion that this will, on the merits, could not be supported as a good will of lands. This however not being the case, it becomes necessary for me, at least to express my doubts as to the correctness of that decision.

I think it clear, that if a man's name is used as next friend to infants, without his knowledge or consent at any time given, he is not answerable for costs, and if not so answerable, and in no other way interested, that he is a good witness. The improper conduct of adult plaintiffs or their counsel, in prosecuting a suit in this way, jointly

with infants, cannot prejudice the latter, nor subject the next friend, without his assent, to the payment of costs.

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There is no proof in the cause, that the witness even knew that his name had been used as next friend; on the contrary, it is in proof, that when it was first so used he was ignorant of it. It does not appear that he ever paid fees to counsel, attended to take depositions, or took any part in the business. It is said, he was probably so named in the commissions; but this does not appear: on the contrary, the caption of his deposition recites a commission in a suit between "*Burwell and others and Corbin and others*;" and in another deposition taken before the same justices, the caption recites the names of the parties, without naming Ball as next friend. Had he been so named in the commission by which his deposition was taken, it is strange that neither the justices nor the parties should have adverted to the extraordinary fact of one of the plaintiffs giving evidence in the cause.

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But this deposition was not excepted to, by endorsement on it, as is usual in chancery suits. On the contrary, the cause was twice heard on this deposition with others, without objection; once, probably when Ball was alive, and once during the same term, at which his death is stated in the record; at which time too the issue was directed, and the depositions of the witnesses who were dead, ordered to be read on the trial.

There is, therefore, not only the absence of the necessary proof to shew an interest in the witness; but all these facts and circumstances tend to prove the contrary.

But then it is said, that if Ball was not answerable for costs, there was no next friend of the infants, and so they were not properly parties to the suit; and as in that case depositions against them could not be read, so neither could those in their favor; and that on this ground, Ball's deposition would be properly rejected. This at first appeared to me a formidable objection; but on reflection I am not entirely satisfied with it. Suppose one of the de-

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fendants' important witnesses had been dead, and his deposition objected to on this ground, that Ball had never assented to become next friend, might it not well have been said in answer to this, that the suit was regularly brought, a next friend to the infants being named? He could have assented, had the deposition been in his favour, and in that case it would have been read; but as it is *against* him, he chooses now to dissent, and thus the process of the court will be used to entrap and defraud the parties. I should think it would be very hard to exclude the deposition on the part of the defendant under such circumstances. But, if it would have been proper to exclude Ball's deposition for this reason, and if that reason will go equally to exclude all the depositions on both sides, (for they were all taken before Burwell was appointed next friend,) ought not the chancellor to have set aside the verdict, to have awarded new commissions, or to have directed a new trial, excluding all the depositions?

These are important considerations, which I should deem worthy of further investigation, and proper to be decided one way or the other, were it not, that excluding Ball's testimony, and considering every thing else as regular, I am satisfied, on the merits, that the writing in question cannot be supported as a good will of lands.

This paper-writing, *signature and all*, is in the hand-writing of the appellee Corbin, who is the principal devisee; and the question is, whether its execution is properly attested and proved by two subscribing witnesses?

The statute requires that a will of lands shall be in writing, and where not wholly written by the testator himself, shall be *signed* by him, or by some other person *in his presence and by his direction*, and be attested by two or more credible witnesses in his presence.

In the case before us, the alledged will is one which is not signed by the testator, as before stated, but it is proved by a witness, (independent of what is said by one of the subscribing witnesses, as hereafter noticed,) that Corbin

acknowledged that he himself had subscribed the testator's name to it. The subscribing witnesses also attested it at different times.

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I understand it to be clearly established by all the authorities, that every important requisite of the statute must be attested and proved by each witness. Otherwise, there would be but one witness to prove what the law says must be attested by two. They must attest a *writing*, not a *blank sheet*; they must attest a *writing signed*, and not one *unsigned*. When this writing was handed to the first subscribing witness, and he was asked to attest it, it was not signed. Suppose he had attested it in that form, and it had remained unsigned until the next day, when the second witness attested it, and the testator had then discovered the omission, and signed it; would this be an attestation of a *signed will* by two witnesses? Or suppose that one witness attests in the presence of the testator, and the same witness takes the same paper into an adjoining room, where another witness only hears the testator acknowledge, and attests the same paper, but not in his presence; although the first witness is one of the highest credit, and a jury on his evidence should find that it was the *same paper* which the testator had but the moment before signed and published as his will, could it be established as such under the statute?

As I understand the law and all the adjudications upon it, we are not at liberty to believe any thing, which the statute requires to make the will a complete one, on the testimony of one witness. Suppose the statute had required but one witness, and he knows only a part of these facts, which he is to attest; as, for instance, he knows it was a writing he attested, but he does not know it was a *signed writing*, and it turns out that the signature, which afterwards appears to it, was not even in the hand-writing of the alleged testator. Could this be established as a will executed, according to the statute? And would not such a decision open a wide door to frauds?

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The witnesses, in this case, attested at different times. The first proves, that when he was called on to attest, the paper was not signed at all. When the testator was reminded of this, he directed Corbin to sign it for him, which he did in his presence. This witness, then, proves the signature by another. But that is not enough. He must prove and did prove, that it was so signed by the direction of the testator, and in his presence; and although it was not stated by the testator to be his will that he had thus caused to be signed; yet, if the other witness had been present at that time, and had attested and proved the same facts, I am not prepared to say that it would not be a publication of a will, notwithstanding it was not declared to be such at the time; although I think, especially where it is written and signed by another, that there are many reasons which would require a publication of it, in some way indicating that it was a will, in order to guard against frauds. The other witness, however, is totally silent as to the signature. In his deposition, he does not say it was a signed paper. But the verdict, after mentioning this writing as proved by the first witness, goes on to find that this *same paper* was presented to, and attested by, the second witness. But what is the fair interpretation of this finding? The first witness identified the paper that he speaks of, and which, on the day before, had been signed by Corbin and attested by him: and the second witness subscribed the *same paper*. The jury then could well find, as they did, without proof by the second witness, that he saw a signature to the paper; and as the deposition of this witness is silent as to signature, and the jury are also silent as to this important point, except so far as they refer to it as the *same paper* (a term, which they give to it before it was signed at all,) I cannot infer that this witness saw a signature of any kind, when he attested. So, that if the will had been signed by the testator himself, there being no acknowledgment or recognition of the signature before this witness, I think the proof that it

was a *signed* will, would be incomplete. The verdict is evidently intended simply to state the facts as proved by these two witnesses, and to submit to the court, whether such proof is a compliance with the statute. They had no right to find the fact *conclusively*, on the testimony of one witness, that it was a *signed* paper. We must, therefore, consider it, as if they had said "so far as one witness can establish the fact, we find it was a signed paper, and that the said paper, so proved to be a signed paper, was published to, and attested by, the second witness."

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It was a long time, and after much hesitation, before the courts were satisfied, that all the witnesses must not be present at the same time, and see the very *fact* of signing. Indeed, they ultimately came to this decision, as it were by *piece-meal*. First, the testator *resealed*; which was considered (erroneously as is now admitted) to be an act equal to signing; then came a case in which he drew his pen over his name before a subsequent witness. By these solemn acts, it was considered that he had signed in fact before each witness, at different times; and although the statute required that they should attest a *signed paper* in presence of the testator; yet, as it did not require them to do so in the presence of each other, and having attested what was considered the same fact, though at different times, it was thought they could as well prove it as if they had attested together. Having thus established the propriety of a separate attestation, the next question was, whether an *acknowledgment* of the hand-writing, without *resealing* or drawing the pen again over the name, would do? It was then discovered, that separate attestations had been too long established to have that question disturbed. Admitting this to be law, then it was found that an acknowledgment of the hand-writing was as good, may better, than *resealing*, which at most could only be considered as a recognition of the name opposite to the seal; sealing itself being no *signing* within the statute; and that it was even better than drawing the pen over the

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name again, which some judges seemed to think might be a re-execution, and destroy the previous attestation.

An acknowledgment, then, that the signature was the hand-writing of the testator, was considered tantamount to proof of seeing him write his name. It was capable of disproof too, if a will not signed by him, was offered to probat; and although it was admitted, that even with this guard, these decisions opened a door to frauds; yet the cases had gone too far to admit of the court's retracing their steps, which they would willingly have done; but they protest against going farther. No case is to be found, in which the acknowledgment of a signature, not in the hand-writing of the testator, was held enough.

In *Ellis vs. Smith*, (a) lord Hardwicke said; "It has been hinted as if this determination would lead the way to a farther deviation from the statute, and by consequence allow testators' declarations, that another signed for him, to be good; but authority given by a testator is a *collateral thing*, and a thing that ought to be proved. Consequence is not to be built upon consequence, in cases of this nature. I think where things are expressly required by statute, courts are not to say other things shall be equivalent to them."

I am clearly of opinion, therefore, that there is no case under the statute of frauds in England, in which an acknowledgment has been received as equivalent to proof of actual signing, except where the testator has, in some way, recognized the signature as his *own hand-writing* in the presence of all the witnesses, and who were therefore all capable of attesting the paper as a *signed paper*. Such recognition has only been held as something *equivalent to personal presence*, at the act of signing; but it could not be so, unless the signature was at least seen, and in some way acknowledged. No case, I think, has gone beyond this, and all the judges agree that even this was going too far.

(a) 1 Vez. junr. 11.

There is no case where the signature was by another, not in the hand-writing of the testator, and where even a full acknowledgment *that it was by another* (naming him) by the direction and in the presence of the testator, has been held equivalent to proof of all these facts. Lord Hardwicke says, this would not be admitted. *A fortiori*, all these things would not be inferred by a simple declaration, that "this is my will," even if the witness saw that it was a signed paper. The most that such a declaration would be held to prove, according to the cases, is, that this would be a recognition of the testator's *own* signature. I incline to think the cases do not go this far; but that an express recognition of the signature *as his* accompanied with proof of that fact, if required, is as far as they establish, and as far as we ought to go. But say it would be a recognition of *his* signature, if it was actually signed by him; how can an acknowledgment, *in the same form of words*, prove one thing, to wit: *this is my hand*, if that had been the fact, or another, to wit: *this is my name, signed by such a person in my presence and by my authority*, when the witness heard no such thing? If all this is to be inferred from the simple acknowledgment of the will, (which is all that is found in this case as it regards the second witness,) who is to infer it? Not the witness; he can only state the fact. The jury I think could not do so, and if they could, they have not done so. If the court can, it must be, not as an inference of *fact*, but of *law*: that according to the true construction of the law, the second witness has proved that the testator, by this acknowledgment, has established the fact, *not to the attesting witness but to the court*, that this will was signed with his name, by Corbin, in his presence and by his direction. We cannot derive our knowledge of this from the first witness. He is not competent, of himself, to prove any important fact, any more than one witness can disprove an answer in chancery. We must have two, and must make out, *by construction*

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of law, those matters of which the second witness was ignorant. We may simplify the enquiry as to our power to do this, by supposing that Corbin had signed the will before either witness attested, and that they attested, either separately or together, just such an acknowledgment as the second witness proves; could we say that this will was signed by Corbin, in the *presence* and by the *direction of the testator*?

If lord Hardwicke is right, as I think he is, in saying that even an express acknowledgment of those facts will not do, surely one, which would import at most that it was his *own hand-writing*, will not.

One reason why a seal was not considered equal to signing was, that a seal could at this day be easily counterfeited. It only remained to counterfeit the hand-writing of a witness or witnesses who were dead, by proving whose hand writing the will would be established. So in the case of signature by another, all that will be necessary will be to sign it in a hand not like that of any person known, and forge the hand-writing of witnesses who are dead; or get witnesses to swear that he acknowledged the will, without stating who wrote the signature, so as to avoid detection from the guard that circumstance would afford, and the will is established, as one *signed by authority*.

When a man acknowledges a will signed by himself, he knows the fact that he did sign it, and if it turns out that a will is offered to probat, not signed by himself, the fraud is detected. But he may think he is acknowledging such a will as this, when in fact, being in extremity, another, not signed by him, has been imposed upon him.

I am therefore humbly of opinion, that if we establish this will, we must do it on the testimony of one witness only, and as the law does not permit this, that the decree of the chancellor must be reversed.

Judge CABELL concurred in opinion with Judge Coalter, that the decree of the chancellor should be reversed.*

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The only question submitted to the court by the agreement of the parties and the special verdict found in pursuance of that agreement, is, whether the paper-writing, purporting to be the last will of James B. Burwell is proved by the attesting witnesses Scrimger and Barrick, according to the act referred to in the verdict. The material words in that act are, “so as such last will and “testament be signed by the testator or by some other “person in his or her presence and by his or her direction; and moreover, if not wholly written by himself or “herself be attested by two or more witnesses in his or her “presence.” It is admitted that Scrimger’s testimony is entirely in compliance with the statute. He proves all that is required by it; but in examining the testimony of Barrick the second witness, no aid is to be derived from Scrimger’s testimony, because the statute requires two witnesses to the same facts. Nor is the testimony of Barrick to be eked out by any thing in the verdict, unless he also proves the facts required by the statute. So far the paper-writing is still proved by one witness only, and the statute is not complied with. What is proved by Barrick? He says (as found by the jury) that he was sent for and went to the house of James B. Burwell: that he found him sitting on the bed with the said paper-writing in his hand (he calls it the said paper-writing before it was attested by him, as Scrimger does before it was signed by him or by Corbin, for Burwell,) when the said Burwell asked him to sign that paper, and thereupon he signed his name to the said paper as a witness, in the presence of the said Burwell: that he then asked the said

* By some accident this opinion is not in the possession of the Reporter; but if it can be procured hereafter, it shall be given in the appendix.

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Burwell what it was he had signed? And the said Burwell replied, "it is my last will, but you need not make a talk of it; it is time enough." He (Barrick) says nothing to the fact, that the paper-writing was signed by Burwell or by Corbin for him, at the time he attested it. From all that appears by his testimony, it was not signed by either of them, at the time he attested it. In calling it the said paper-writing before the jury, he points to a time, before it was signed by himself, and proves nothing more than that it was the same paper that he had signed. If he meant any thing more, he would not have called it "the said paper-writing" when it was not signed by himself, and when it was so signed, as it was when it was before the jury. Scrimger spoke of it in the same sense. The requirements of the statute have been before stated: it ought to have been signed by Burwell himself or by some one for him, or it was not a perfect will to be attested, according to the provisions of the act. It would not be contended, that if it was attested before it was signed, it would be a good attestation: because it would let in the frauds intended to be prevented. For example: if in this case Scrimger had attested it when handed to him by Burwell, and before Corbin had apprized Burwell that it was not signed, and signed it for him, it would not have been attested even by Scrimger according to the statute. But Burwell acknowledged to Barrick, that the paper-writing was his last will; so in effect he did to Scrimger, though not in terms, when he asked him to witness it before he was reminded by Corbin that it was not signed. He thought no doubt, at that time, that it was his will, though not then signed by any body. This example, extracted from this case, shews the danger of dispensing with proof, that it was signed, when attested according to the statute. The case before the court has been nowhere decided, that I know of. The question whether the *factum* of signing must not be proved by all the witnesses, has been very much discussed in all the cases from

Lemain and Stanley, (b) down to the cases of *Grayson* and *Atkinson*, (c) and *Ellis and Smith*. (d) That point has been put at rest very reluctantly by the English Judges. Some of them seem to think that great frauds will be let in, by dispensing with this supposed requirement of the statute of Charles, which is like our own as regards the present enquiry. But in no case have they dispensed with proof, that the will was signed by the testator or by some one for him, according to the statute. In the case of *Grayson vs. Atkinson*, the acknowledgment by the testator was, that it was his signature which lord Hardwicke calls proving the *factum* of signing in some sense; and his illustration of his meaning by the practice of acknowledging the execution of a bond, by the party acknowledging to the witness that the signature was his hand, shews, that proof of the signature of the testator was not to be dispensed with. If Burwell in this case had acknowledged the signature to be his, it would have been proof, within the cases of *Grayson* and *Atkinson*, and *Ellis* and *Smith*; the question being in these cases, whether the signing was proved according to the statute. In the case cited from *Vezey* and *Beams*, there was proof also of the acknowledgment of the signature. If the case now before the court had presented the same question, I should incline to the opinion, that the bare acknowledgment of Burwell, that the paper-writing was his last will, in the absence of all proof that it was signed at the time by him, would be insufficient under the statute. But the question here is still a broader one. Does Barrick prove that Corbin signed the paper-writing for Burwell, at his request and in his presence, according to the statute? In another form, does the acknowledgment of Burwell to Barrick that the paper-writing was his last will, prove those facts? I think not. In the case of *Ellis vs. Smith*, lord Hardwicke, after deciding that the acknowledgment

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(b) 3 Lev. 1.

(c) 2 Vezey, acur. 404.

(d) 1 Vezey, junr. 41.

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of the signature by the testator was proof of his having signed it, goes on to remark "that it had been hinted as "if this determination would lead the way to farther deviations from the statute, and by consequence would "allow a testator's declarations that another signed for "him to be good. But authority given to another is a "collateral thing, and a thing that ought to be proved, "Consequence is not to be built on consequence, in cases "of this nature." This, it is true, was not the question before the court; but it naturally grew out of the one that was, and had, no doubt, been much reflected on; and although it may be called an *obiter* opinion, it is entitled to great weight. In the case before the court, Burwell made no such acknowledgment, as in the supposed case. He did not say to Barrick that Corbin had signed it for him, at his request and in his presence. It is still a weaker case. He only acknowledged the paper-writing to be his will; which, whatever might (upon consideration) be my opinion, on the case put by lord Hardwicke, I think is not adequate proof under the statute, that it was signed by Corbin, for Burwell, by his direction, and in his presence. The statute requires two witnesses to the same facts, as a security against the perjury of one. Supposing Scrimger to be perjured, Barrick's testimony is insufficient; and so much of the decree as establishes the will in question, to be a good devise of the real estate, I am of opinion, ought to be reversed, and the rest affirmed.

Judge ROANE :

It is my fortune to differ in opinion on this case, after great deliberation, from all the other judges. It is therefore my right, and perhaps my duty, to assign, somewhat at large, the grounds and reasons of that opinion.

Upon the trial of the issue in this cause, the appellants produced the deposition of William Ball who was admit-

ted to be dead, and whose deposition had been taken without objection in the court of chancery. That deposition was objected to by the appellees, on the ground that he was named in the bill as next friend to the infant complainants, and therefore liable for costs and interested; and the said objection was sustained by the court, and the deposition rejected. The circumstance that this deposition may have been before read in the court of chancery, is of no account. That court and every court acting under its authority has always, even up to the time of its final decree, a power to reject depositions, which, from intrinsic evidence existing of record, appear to be illegal.

It is admitted that there was no *specific* order of the court, admitting Ball as the next friend; but the question is, whether under the practice of this country, under all the circumstances of this case and all the admissions of the parties, that fact ought not to have been taken for granted. Those circumstances *narrowed* the enquiry before the court. The real question therefore was, not so much whether Ball was the legalized next friend of the plaintiffs, as whether the appellants were at liberty, under the circumstances and admissions aforesaid, to make the objection.

On this subject of *prochein ami*, the doctrine is that the nearest relation is generally the next friend of an infant; but as that relation may, himself, have injured the infant, and be liable to a suit therefor, or may be otherwise an improper person, the court will *permit* any person to institute a suit on his behalf, and he is to be named as next friend in the bill.(e) That person ought however to be a person of substance, because he is liable to pay the *costs* of suit.(f) While it is conceded that this next friend ought to be *admitted* as such.(g) it is believed that under the practice in this country, his being named in the bill, and the suit going on without objection, is a *permission* on

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(e) Mitf. 25. (f) 1 Ath. 570. (g) 1 Strange, 708.

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the part of the court, and amounts, in effect, to such admission; and much more, where he has been recognized, as in this case, by the subsequent acts of the court, and the subsequent acknowledgments of the parties.

This next friend is not only liable for the costs, but is to be removed if he is treacherous to, or negligent of, the interests of the infant; (*h*) and it is supposed, that all these checks will generally prevent improper persons, from obtruding themselves; and this consideration will perhaps justify a less strict principle, in this particular, on the part of the court. All that is required even in relation to the party interested in the costs, is, that the next friend should have been recognized and sanctioned by the court. In relation to his co-plaintiffs, they shall be concluded by their own acts and admissions, from objecting that he is not the legalized next friend of the infants.

In the case before us, it is true that *Ball* is not named as next friend in the bill. A blank is left for the name in that bill; but this omission is abundantly supplied. In the heading or caption of the record or proceedings, he is named as such. He is so named at the rules in October, 1812, when a conditional order was made taking the bill for confessed; and this order, so headed, was set aside in court on the 12th October, 1813. To all these proceedings the appellants were parties and privy; and in the last case an order was made in court, setting aside a rule in which *Ball* is stated to be the next friend of the infants. Was not this a concession by the court, and an admission by the co-plaintiffs, that he really stood in that character? Again; to say nothing of the admissions probably contained in the commission under which this deposition was taken, how does the matter stand, upon the order of the 21st of September, 1816? On that day *Bacon Burwell*, one of the appellants now making the objection that *Ball* was not in reality the next friend of the infants, moved

the court of chancery by his counsel, to be himself permitted to prosecute as next friend in lieu of W. Ball deceased. This motion was granted by the court, and thereafter he acted as such. After this, can Bacon Burwell or the court, be permitted to deny that Ball had been the next friend in his lifetime and was so when this deposition was taken? So also the proceedings and verdict in Caroline court, all state, and therefore admit, that Ball had been the next friend; as does also the bill of exceptions, taken on the part of the appellants. Nay, that bill even admits further (contrary, however, as it appears, to the fact,) that Ball was named as next friend in the bill filed in this cause. The appellees objected to Ball's deposition because he was so named therein, and the appellants, not denying it, but admitting the fact, only proved by one of the counsel, that Ball was not consulted on the subject. The fact of his having been named in the bill as next friend is, however, distinctly admitted by both the parties to the bill of exceptions.

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However it might be, therefore, in relation to Ball's representatives, were they now before the court and charged with the costs, can it be doubted that *quoad* the appellants, their own repeated admissions, and the repeated recognitions of Ball as the next friend by the court, will estop them from making the objection? Notwithstanding this, however, they were still not without remedy as to getting his (Ball's) deposition, during his lifetime. They might, if his evidence was important, have had his name struck out of the record, another next friend substituted, and then have taken his deposition. (i) They, however, did not pursue this course, and must abide by the consequences of their omission to take it. As for the objection on the part of the appellees, it was not necessary for them to state and prove a fact, which was already admitted of record.

(i) Mitt. 25.

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Ball's deposition was, therefore, I think, rightly rejected by the court. But even if it were otherwise, it does not follow that for that error, the decree should be reversed. It is not at present distinctly seen, that the decision of the jury should have been different, if that deposition had been admitted. On that point, however, I have formed no conclusive opinion.

I come next to consider this case upon the merits. This cause having been heard in the court of chancery, upon the exhibits and depositions of the witnesses, and those depositions being found to be conflicting and contradictory, an order was made by the said court, referring the question of the validity of the will, to a jury; with the usual provision, that on the trial of the issue, copies of the bills, answers, exhibits and depositions of such of the witnesses as are dead or cannot attend, should be read in evidence. On the trial of the issue in the superior court upon that evidence, and the jury at the end of the third day not having agreed upon a verdict, on the fourth day, for the purpose as is supposed, of facilitating that decision, it was agreed by the parties, that the question of law arising upon the evidence of the *subscribing witnesses*, in the event that that evidence should be credited by the jury, should be reserved by a special finding of the facts that the jury may determine to be proved by *that* evidence, to be determined by the proper court. This agreement excluded from the consideration of the jury all the other testimony in the cause, except that of the two subscribing witnesses and that which respected their credibility; and considering that credibility was not only expressly referred to the jury as aforesaid, but was also peculiarly proper for *their* consideration, I shall shut my eyes upon all the other testimony existing in the cause, except the facts which are specially found by the verdict. I must also again remark, that as the special finding is *agreed* and required to be made upon the evidence of the *subscribing witnesses* (that is, of *both* of those witnesses,) that

finding is to be taken as made upon the evidence of both the said witnesses. The jury will be considered as having conformed to the agreement of the parties, which assigned this duty to them, and not as having violated it. The only exception from this construction will be, in relation to facts which irresistibly appear from the verdict, or are thereby expressly admitted, to have been found on the testimony of one of the witnesses only. We must so consider this verdict, however, in point of fact, the case may be; we cannot know that fact to be otherwise, unless it is regularly manifested to our view. Subject to these exceptions and limitations, every fact found in this verdict is to be considered as based upon the testimony of both the subscribing witnesses, and it does not lie in the mouth of either of the parties, to aver the contrary.

While under the influence of this rule of construction, as applied to so much of the verdict as relates to *Scrimger's* attestation, it must be admitted that *Barrick* was then absent; a different result will take place in relation to what passed at the time of *Barrick's* attestation. It may well be, for any thing seen in this verdict, that *Scrimger* was then also present; and if we were even to refer to the depositions of those witnesses as contained in the record, there is nothing therein to shew the contrary. *Scrimger* although present on the third, might have been also present on the fourth of September. This however, we are authorized, if not compelled, to infer from this verdict, taken in connection with the agreement of the parties; and that inference is irresistibly strengthened by that part of the verdict which identifies the paper in question, with that which was attested by *Scrimger and Barrick*. In relation to *Barrick*, *Scrimger* could not well have known that fact, unless he were personally present. If this is in reality, or must be taken to be the fact, upon the true construction of the verdict, then we have the testimony of both the subscribing witnesses, both as to the testator's acknowledgment of the will, and also as to *Barrick's* at-

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testation of it. That however is entirely a matter of supererogation, as I shall presently attempt to shew. One witness is enough as to such attestation; and *Barrick's* testimony as to his attestation, is fully equal to *Scrimger's*, which, as to him, is on all hands admitted to be sufficient. There is no difference between the two cases, except that *Scrimger* attests an actual signing of the paper by the testator, by means of *Corbin*; whereas *Barrick* only proves his publication and *acknowledgment* of it; a difference which, I shall presently endeavour to shew, is entirely unimportant. An acknowledgment of a signature, is only a signing, in another form. In principle it is, in truth, a *signing*.

Before I go into the question whether the *acknowledgment* of a will, or of a signature thereto, is equivalent to an attestation of the specific fact of the *signing* itself; and while I do not abandon the ground I have taken, that the testator's acknowledgment of the will before us, and the attestation by *Barrick* must be taken, upon this verdict, to be proved by *Scrimger* as well as *Barrick*, when *Barrick* alone (like *Scrimger*) was amply sufficient to establish the fact; I must state one or two preliminary observations.

In the first place, it is not necessary that the subscribing witnesses should attest *together*, or at the same time. (j) Again, while it is admitted that a will must be a *perfect* will, by signature, or by signature and acknowledgment, *quoad* every witness at the time of his attestation, yet it is not necessary that the witnesses should *see* the signature, or even *know* that the paper acknowledged is a will. All that is necessary is, that its identity in its complete state, should be established at the trial, in reference to the paper attested by the witnesses. The attesting witness, however, is not perhaps, indispensable to prove the existence of the signature, although it

must be shewn to be the same paper that was attested by him. We are told by Roberts on Wills, ^(k) on the authority of Swinburn (and which the first author says equally applies to devises under the statute of Charles 2nd) that the witness need not *know* the contents of the paper he attests: that it is one of the advantages of written wills that the testator can *conceal* the contents: that it is enough to shew the paper to the witnesses and say "*this is my last will*," provided they can prove the identity of the writing; and these writers recommend it to witnesses to write their names on the back of wills, to enable them to do this. Again, it is said, ^(l) that if a testator signs his will, but delivers it *as his deed*, it is sufficient; for, that it is not necessary for the witnesses to know that it is a will. Admitting for the present, that the *acknowledgment* of a paper, as a will, or of the signature, is equal to the proof of an actual signing, there may be cases in which the identity of the paper is as much established, though it was unseen by the witness, as if he had actually seen the testator sign it; as for example, where a witness *attesting* a paper acknowledged to be a will, but the contents of which were not read by the witness, nor the signature seen by him, has that paper, so acknowledged, delivered to him by the testator, sealed up, and he keeps it so sealed and endorsed, in his desk until the time of trial; would not this be a full and complete evidence of the identity of the paper? And if it was then found to have a signature to it, would it not amount to conclusive proof of the testator's acknowledgment of the signature?

These *desiderata* entirely exist in the case before us. The testator not only published to *Barrick* the paper in question, and *acknowledged* it to be his last will, but the jury further find that the paper thus acknowledged to, and attested by *Barrick*, was the same paper that was also attested by *Scrimger*, and proved in the superior court.

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(k) Page 23.

(l) Bas. abr. 317.

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The verdict had before found, (and you must take all its parts together,) that the paper when signed by *Scrimger* the day before, was then also signed by *Corbin* for the testator, at his request, and the will found on the record, and proved in the superior court, is also found to have a signature to it. When in addition to these facts, *Barrick* swears, (to say nothing of *Scrimger* on this point,) that the paper he signed is the *same* paper with that thus referred to, can we by any possibility even imagine, that it was an *unsigned* paper, when he (*Barrick*) attested it? Can a paper acknowledged and attested on the 4th, and proved and *found* to be the same with one *signed* and attested on the 3rd, and also found at a future time, to be so signed, be taken to have been, *intermediately*, an unsigned paper? Is an unsigned paper the same with one that is signed? Unless, therefore, you go in quest of quibbles, rather than of substance, it is both proved and found that the *paper* in question was a *signed* paper, when it was attested by *Barrick*. We are not at liberty to differ from the jury, upon this point, and to *imagine* that a paper was a *different* paper from another, when the jury have found them to be the *same*. It is not easy to conceive a stronger circumstance of discrimination, on the contrary, than that which exists between a *complete* and *signed* paper, and one which is only *inchoate* and *unsigned*. I do not admit that even *Barrick's* evidence is indispensable to verify this fact of the identity, unless it be under the particular terms of the agreement of the parties; but if it is, we have it upon this verdict; and, as I have before said, we have that of *Scrimger* also.

This view of the facts of this case, brings to our consideration, the only real question existing in this cause. That question is, whether a will signed for another, by his express direction, and *acknowledged* and published by the testator as *his will*, is duly proved under that member of our statute, which legalizes a signature for a testator by the hand of another. While this question has several

times occurred in relation to wills signed by the testator, with his *own* hand ; it has not occurred, that I can find, in relation to a will signed *for him by the hand of another*. Thus the question remains to be decided upon principle ; and the enquiry is, whether there is in fact any essential difference between the two cases. The counsel for the appellants *seem* to have conceded that there is not. They seem to have conceded this, by bending nearly all their force against the sufficiency of the acknowledgment of a will of the *first* description ; a course, which would have been wholly unnecessary, not to say improper, if the objection applied with more force to a will like the one before us.

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As to the first question (i. e. one touching a will signed by the testator himself,) it has been expressly decided. If you throw out of view circumstances which are entirely unimportant, the case of *Westbroach vs. Kennedy*(*) is a direct authority. In that case as to two of the subscribing witnesses (Emerson and Bogs,) the testator only produced the *will* to them, published it as and for his last will, and requested them to attest it. He did not sign the will before either of these witnesses, nor acknowledge, particularly, the *hand-writing* subscribed to it ; but only acknowledged the paper *as his will*. In all these particulars, that case is exactly like the case before us. That case is therefore an express authority in this, except so far as the circumstance that the testator also sealed that paper, in the presence of the witnesses, can make a difference ; a circumstance, which I shall presently endeavor to shew, is entirely unimportant. In that case also it is only proved, that the will *appeared* to be signed to the third witness at the time of his attestation ; whereas in *this* case, that fact is *found* to have had an existence, though I admit it is not found to have been signed (nor is it necessary) *totidem verbis*. That case is,

(*) 1 Ves. and Beams, 302.

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therefore, less strong in *this* particular, than the case before us.

The only circumstance which can differ that case from ours, therefore, is the *sealing* of the will in the former. Sealing, however, is not the *signing* required by the provisions of the statute. It is, at most, only a *circumstance* going to shew an acknowledgment of such signing. It is therefore entirely unimportant, when you have the superior and more conclusive evidence resulting from the *acknowledgment* and delivery. That which is only a circumstance, tending to shew an acknowledgment, is as nothing, when compared to the actual acknowledgment and delivery itself. That circumstance was therefore entirely supererogatory in that case, where the acknowledgment and delivery also existed; nor will it be missed in this case, where we have also that acknowledgment. In that case the circumstance of sealing was, at most, only relied on as one from whence to infer an acknowledgment, and was merged (if I may so say) in the actual acknowledgment and delivery, which was proved in the case; it was included in it. It would be also held to be included in this case, if it existed, and the omission is unimportant, as it does not. Its effect and importance entirely vanishes under the solemn *acknowledgment* and delivery which is *found* to have taken place as to the will before us. The existence of the circumstance of sealing in that case, and its non-existence in this, cannot therefore differ two cases, to which the actual acknowledgment itself is common; and which, as to all important particulars, are precisely the same.

This would be the result, in relation to a mere circumstance, however important and unexceptionable. The objection holds with increased force, however, as to the mere fact of *sealing*, considered as a circumstance authenticating a signature. Such sealing is entirely of a weak and unimportant character. It is entitled to but little weight indeed. Thus, it is said by chief justice

Willen in *Ellis vs. Smith*, (n) that sealing is not signing. Again, it is said in *Powell on devises*, (o) that sealing being at the time of making the statute no longer a mark of distinction (as it certainly is not, when the sealing is with a wafer or a scroll,) that circumstance was rejected, and a *signing* by the testator substituted. Again he says, (p) that sealing is not signing; for, that if it were, it would be very easy to forge a will, which, in relation to the hand-writing of the testator, is more difficult. It is also said, that while sealing is no longer so distinguished as to identify the fact of the *signing*, the acknowledgment of that fact is considered as a proof thereof. Sealing then being repudiated as a signature, on account of its incompetency to discriminate one paper from another, it has little or no weight, when used to identify a signature. Every seal wants an ear-mark to distinguish it from other seals. It is attempting to prove *notiora per ignotius*; and the seal itself is more uncertain and unknown than the *signing* it is intended to authenticate. I hazard but little, therefore, in saying that this circumstance is entirely weak and unimportant; and that its weight is as nothing, when compared to a solemn acknowledgment and delivery itself, as in the case before us. The former circumstance is entirely subordinate and inferior to, and is comprehended within, the latter.

I throw, therefore, out of the case of *Westbreach vs. Kennedy*, as being entirely deceptive, subordinate and unimportant, the fact of the *sealing* which existed in that case; and then the two cases are precisely alike. Then it is decided, that the acknowledgment of *the will* is entirely sufficient, and that there need not be a specific acknowledgment of the *signature* to it. It puts to rest the doubts on this subject, which had, before, been mooted in the English courts, and advances a step further in relation to the statute, in favor of common sense. If I acknow-

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(n) 1 Vez. jr. p. 11.

(o) p. 76.

(p) p. 67.

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ledge a paper as my will, which has my signature annexed to it, I acknowledge that signature in common with every other part of the writing.

But this last decision was not wanting to settle this question, conclusively, to my satisfaction. It had been before settled, upon the *principle* of the adjudged cases. Thus, in the case of *Grayson vs. Atkinson*, (q) while it was admitted by the court that the question whether the *acknowledgment* of the signature was sufficient, had been *vexata questio*, it was *decided* to be sufficient. It had in this case been objected, that as the word "attested" was added to the word "subscribed," in the statute, it imported that the witnesses must attest the *very fact* of the signing, and that an *acknowledgment* of the will, or even of the signature, was not sufficient; but it was resolved by the court, that the attestation of the *acknowledgment* of the will, is an attestation of the fact acknowledged, and is to be construed according to the rules of evidence, applying as at the time of enacting the statute, in other cases; as in the case of a bond, for example, which being made and signed, and afterwards acknowledged before others, by the obligor, to be his bond, was held to be evidence of a signing by him. Again, it is said in *Powell on devises*, (r) that as an attestation upon an acknowledgment is good in every other case, so it is in the case of a devise. Again it is said, (s) that an acknowledgment of an instrument as a man's *deed*, necessarily implies a *delivery* of it; and in *principle* there is no difference between that case and the one before us. You can as well imply a *signing*, as a *delivery* of a given instrument. The first as well as the last is incidental to the acknowledgment. Again, we are told, (t) (and it is an authority decisive of the question before us,) that although the statute of Charles says, that the will must be *signed* by the testator, yet that an *acknowledgment* of the signing is

(q) 2 Vez. 456.

(r) page 71.

(s) p. 76.

(t) ib. p. 121.

as good as proof of *seeing* the testator sign. It would indeed be an anomaly in the law, if it were not so. In all other cases, the acknowledgment of the fact in question, is fully equal to any evidence of it.

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I take it therefore to be a point not at this day to be questioned, that the acknowledgment and publication of a paper *as a will* is a sufficient proof of the signing thereof, if it further appears, that the paper has a signature. If there was any doubt before, the case of *Westbreuch vs. Kennedy* has put the same at rest; to say nothing of the unanswerable *principles* on the subject of acknowledgment, to which I have adverted. There is, perhaps, however, no adjudged case in relation to a will signed *for* another, as in the case before us. That, however, is not very strange, when there is perhaps but a single conclusive decision in relation to the more common case of a signature by the testator himself. There is however no decision *against* us, and in *principle* there is no difference between the two cases. It was indeed said by lord Hardwicke in *Ellis vs. Smith*, that the decision then to be given might lead the way to further deviations from the statute; and by consequence to allow the testator's declaration that another signed by him, to be *good*. He added, that an authority given by a testator is a *collateral* thing and ought to be proved; and that consequence is not to be built upon consequence, in cases of this kind. I will here remark, that these observations of this judge, are entirely *obiter* and *extra-judicial*: that they did not apply, at all, to the case then before the court: that this point had not been *argued*: and that every thing collateral or not collateral which is susceptible of proof, is also capable of being acknowledged; which acknowledgment is indeed only a *superior* species of proof. The signing of a will for another, at his request, is indeed rather a more *complex* idea than a signature by one's self; but it is equally within the knowledge and power of the party; it is equally susceptible of proof. Admitting the existence of the signature, I am just as competent to admit

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that it was made by another at my request, as that it was annexed thereto, by myself. Although there may be shades and degrees of difference between the facts thus admitted, there is no difference in *principle* between them. It would be an useless waste of time to pursue this discussion any further. The counsel for the appellants wisely disclaimed a difference between the two cases ; or if they made any difference, it was but a faint one. In fact and in *principle*, there is no kind of difference between the two kinds of signature, now in question. In *both*, the testator is competent to acknowledge that, which, taken in reference to the case before the court, complies with the requisitions of the statute. The *general* acknowledgment of the testator, comprized in the case before us, carries with it all the particulars. It is equivalent, as applied to this case, to a *specific* acknowledgment by the testator, that the will was signed at his request, by the hand of another.

These are my sentiments upon this case, after a long and mature consideration. I am therefore clearly of opinion, that the will in question has been duly proved, according to the requisitions of the statute ; that the decree of the court of chancery which has affirmed the judgment of the superior court, and the conditional verdict of the jury, should be itself affirmed ; and that the will before us should be established. The other judges are, however, of a different opinion ; and their decision is, that the decree should be reversed, and the following entered as the opinion and decree of the court :

“ This day came the parties,” &c. “ and the court,” &c. “ is of opinion, that the paper-writing in the bill mentioned, which is alledged by the appellees to be the last will and testament of James B Burwell, is not proved by the attesting witnesses according to the act of assembly referred to in the verdict, and that the said decree, so far as it establishes the said paper-writing to be a good devise of real estate, is erroneous. Therefore it is decreed,” &c.

Wilde, &c. against Fox, &c.

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A parole agreement for land, followed by part performance, enforced in a court of equity.

This was an appeal from the Richmond chancery court.

John Fox and Maria his wife, (the latter of whom was daughter and devisee of Esme Smock deceased,) the said Fox as executor of Esme Smock, and Heathee Smock his widow, filed their bill in chancery against William Wilde and Thomas Watson. The case, as extracted from the original and amended bills, is, in substance, as follows: that Esme Smock, in his lifetime, being indebted to Miles Selden, gave him a mortgage on a tract of land near Richmond, called Fairfield, to secure the payment of the money: that Smock being unable to pay, the mortgage was foreclosed, and the land exposed to sale: that on the day of sale, William Wilde became the purchaser; an agreement having been previously made between him and Smock, that Wilde was to bid the amount to be raised under the decree, to have *half* the land, and to pay six thousand dollars for the said moiety; and the said Smock was to have the other half: that in consequence of this agreement being known, there was no bidder but the said Wilde: that since the death of the said Smock, the said Wilde has applied to the complainant Heathee, (who, he seemed to suppose, had a title to the half of Esme Smock,) and offered a like sum of six thousand dollars for her moiety; observing at the same time, that he had made the same offer to Esme Smock in his lifetime, but the conclusion of the bargain was prevented by Smock's death; and that he owed a balance on account of his purchase of the moiety, which he was then ready to pay: that after the purchase at the sale aforesaid, the said Esme Smock remained in possession of the said land, and accounted

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with the said Wilde for his part of the rent, and afterwards determining to rent it out, the said Smock and Wilde advertized it to be rented, and Thomas Watson became their tenant: that no conveyance has yet been made by the commissioners under the decree, which delay is supposed to arise from the said agreement prior to the sale: that the complainants are ready and willing to carry the agreement into effect, between Smock and Wilde, either by getting the one half, and releasing any interest or claim to the other, upon receiving a like release from the said Wilde; or, if that is not the agreement, by paying whatever the court shall adjudge they ought to pay under the said agreement. They therefore pray, that the said Wilde may deliver up a moiety of the said land, or such greater quantity as the court shall adjudge them entitled to, and account for the profits in such manner as the court shall deem equitable.

The defendant Wilde, pleaded the statute of frauds and perjuries in bar of the claim of the complainants, because no note or memorandum in writing, containing the agreement set forth in the bill, was ever written or signed by him or by any other person for him. In answer to the bills, he says, that he attended the sale under the decree, for the purpose of bidding on his own account, he being desirous of purchasing the property; that there were several other bidders at the sale; that the said land was set up in separate lots, and the defendant became the purchaser on his own separate account of the first lot that was sold; that after this purchase, a conversation took place between the defendant and Smock, when the defendant told Smock that he might be one half interested in his purchase, on his advancing half the purchase money; that the other part of the land was then set up, and the defendant became the purchaser thereof; that Smock being unable to pay one moiety of the purchase money, an agreement was entered into between him and the defendant, that the latter should become the purchaser of

Smock's part, at the price of six thousand dollars, out of which was to be deducted the moiety of the purchase money paid by the defendant, and the balance was to be paid to the said Smock; that this contract would have been immediately carried into effect, but for a question that was started, respecting the right of dower of the said Smock's wife; and before this difficulty could be removed, Smock died, which prevented the complete execution of the contract, on the part of the defendant; that Smock continued in possession after the purchase, as the defendant was unwilling to turn him out by force, and being willing that he should have a moiety of the land, on re-paying him a moiety of the purchase money with interest; in which event, Smock was to allow rent at the rate of one thousand dollars for the whole; that there never has been any writing signed by the defendant, in relation to any rent of the said property, received or paid by the said Smock.

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The answer of Thomas Watson admits, that he is still in possession of the land in question, under a contract with the defendant Wilde, and considers himself bound to him only for the rent, and submits to such decree as the court may think proper to make in the premises.

Depositions were taken, going to establish the nature of the parole agreement between Smock and Wilde, and to prove declarations of the parties, respecting it. But, the most important exhibit is a receipt from Wilde to Smock, dated the 1st of June 1811, for one hundred dollars, expressed to be in full for one quarter's rent of *Wilde's part of Fairfield*, ending on the 18th of May preceding. This receipt is signed "William Wilde." Smock is admitted to have continued in possession of the land for some time after the sale under the decree.

The chancellor decreed, "that it is not competent to the said Wilde, to oppose the act against frauds and perjuries, to the execution of the parole agreement made with the said Smock, in his lifetime, for the land in the

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Wilde, &c. "bill mentioned, and at the same time, to insist upon the benefit of a like agreement with the said Smock, for the same land, which, in fact, on the part of the said Wilde, is asking the performance of the first agreement, the execution whereof, in part, by the parties thereto, is proved, by leaving Smock in possession of the land, and afterwards receiving and receipting of him for one hundred dollars in full of a quarter's rent due to the said Wilde, on account of their said agreement; and now to allow Wilde, to refuse a performance of that agreement, by any construction of the act for the prevention of frauds and perjuries, when most clearly it was designed against both." He therefore decreed, that upon payment by the plaintiff Fox to the defendant Wilde, or in case of his refusal to receive the same, upon placing to his credit in the Bank of Virginia, one half of the purchase money, paid by the said defendant Wilde, for the Fairfield tract of land, in the bill and proceedings mentioned, at the sale thereof made by the commissioners of this court, in pursuance of the decree in the suit Selden against Smock, an exemplification of the record of which suit is amongst the exhibits aforesaid, after deducting therefrom one half of the rents and profits of the said tract, from the time that the said Thomas Watson became the tenant thereof, and also the amount of so much money as was left with the said Wilde, by the commissioners of sale under Selden's mortgage, for the benefit of the said plaintiff Maria, as well as any surplus due to the said Smock and left in the hands of the said Wilde, by the said commissioners, with interest on these sums respectively, that the said defendant Wilde do, by a good and sufficient deed, release to the plaintiff Heathee, the widow and relict of Esme Smock deceased, for her natural life, one third of a moiety of the said Fairfield tract of land, and the inheritance of the said third and residue of the said moiety, to the plaintiff Maria the devisee and heiress

“ of the said Estate, subject to the said John Fox, for so
 “ much of the purchase money advanced by him as afore-
 “ said : and that the said plaintiff John Fox and Maria Wilde, &c.
 “ his wife, do thereupon, by like good and sufficient deed, ^{1892.}
 “ release to the said Wilde, all claims upon the other ^{April.}
 “ moiety of the said tract. And the court doth further
 “ order an account to be taken by one of the commission-
 “ ers of the court of the sum decreed to the said Wilde as
 “ aforesaid, as also of the rents and profits of the said
 “ Fairfield estate, from the period aforesaid, who is di-
 “ rected to examine, state and report the same to the
 “ court, with any matters specially stated, deemed perti-
 “ nent by himself, or which may be required to be so
 “ stated.”

From this decree, Wilde appealed.

The case was argued in this court by *Wickham* for the appellant, and *W. Hay, jun.* and *Leigh* for the appellees.

For the appellant it was contended, that the statute of frauds afforded a complete bar to the claim of Fox ; and the case of *Henderson vs. Hudson*(a) was cited in support of this position. The plea of the statute of frauds is not overruled by the answer, where the statute is expressly relied on.(b) . In this case there was no part performance. Smock was originally in possession, and merely continued that possession after the sale. He remained merely by the permission of Wilde, who did not think proper to turn him out. The rule is, that unless the act alleged to be in part performance, is clearly in execution of the parole agreement, it will not take the case out of the statute of frauds.(c) But, if the statute does not afford the appellant protection, the second agreement, stated in the answer, is established by the evidence, and is the one

(a) 1 Mun. 510.

(b) 6 Vez. jun. 39. *Couth vs. Jackson.* 12 Vez. jun. 406. Sugd. 68, 69.

(c) Sugd. 73, 74. 1 Sch. & Lefr. 28.

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which ought to be enforced. It is at least competent to *rebut* the claim of the appellees, although it may not be sufficient to *establish a new contract* in favor of the appellant. (d) A defendant may *set aside* or *modify* even a *written* agreement by a parole contract. *A fortiori*, one parole contract may rescind another. (e)

The counsel for the appellees contended, that the agreement set forth in the amended bill was distinctly admitted by Wilde, and clearly proved by the evidence. The plea of the statute of frauds was properly over-ruled, because the agreement was in part performed. The rule in such cases is, that the plaintiff, after shewing the act of part performance, may go on to prove the agreement, either by the *confession* of the defendant, or by evidence *aliunde*. (f) Possession *under the contract* and which can be referred to nothing else, has ever been held, to be a sufficient act of part performance. Such was the possession of Smock. It is proved, that after the sale, he remained in possession of the whole tract, and paid Wilde for a moiety of it, only ; an act which is utterly inconsistent with Wilde's ownership of the whole tract. That he was originally in possession at the time of the sale under the decree, is not material. Even the possession of a tenant who makes a parole contract for a new lease, by which he pays additional rent, and who holds over at the expiration of his old term, has been held a sufficient act of part performance. (g)

The subsequent agreement *admits* the first under which Fox claims, and has for its basis a right in Smock to a moiety of the land ; and if it be not such a one as a court of equity will execute, there is an end of the cause. It was not of that character. It was a new and substantive agreement by parole, in execution of which no act was performed. It is true, that a defendant is, in some

(d) 7 Vez. jun. 211. Newland on contracts, 909.

(e) 2 Vez. sen. 299.

(f) 1 Foub. 172. Rowton vs. Rowton. 1 H. & M. 99, Judge Roane's opinion

(g) Wills vs. Straddling, 3 Vez. jun. 378.

respects, in a better situation than a plaintiff, in a bill for the specific execution of a contract, as to the admissibility of parole evidence. An agreement may be abandoned by the parties : therefore, a defendant may shew a parole agreement to that effect, by which there is a complete dissolution of the contract, restoring the parties to their former situation. He may also, to rebut the plaintiffs' equity, shew fraud, surprise, mistake. But, whenever a new and substantive agreement, as in this case, is set up in bar to the execution of one in writing, or what is equivalent, of one which has been in part performed, which is not intended as a dissolution or abandonment of the first, but which is founded upon it, as a subsisting, valid agreement, it will not be a bar, unless it be such a contract, as a court of equity would execute, if the defendant were a plaintiff asking its aid.^(h) Such was the case of *Legal* and *Miller* cited by Mr. Wickham. The other authorities cited by him, will be found on examination, to fall within some of the exceptions above stated, as to the admissibility of parole evidence.

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As to the alledged variance between the contract set forth and that proved, it may be admitted that there is some want of precision in this respect. But the objection is a merely *formal* one, which the court always strives to get over. It is sufficient if the contract be *substantially* proved as laid, which has been done in this case.

Wickham replied.

Judge BROOKE* delivered the opinion of the court, that the decree of the chancellor should be affirmed.

(h) Price vs. Dyer, 17 Vez. jr. 356.

* Judge Roane, absent from indisposition.

1852.
April.

McPherrin and others, against King and others.

Where a party applies to a court of equity, to be relieved on the ground of usury, and does not call upon the defendant, for a *discovery*, but proves his case by evidence *aliunde*, *quare* whether he can only be relieved to the amount of the usurious interest, upon paying the principal with lawful interest, or shall be relieved from the debt *in toto*?

Quere. What shall be considered a bill for a *discovery*?

This was an appeal from the chancery court of Winchester.

Thomas McPherrin and Catharine Gaither, presented a bill of injunction to the chancellor, setting forth the following case: that the complainant Thomas, borrowed a considerable sum of money from the Bank of Martinsburg and the Merchants' Bank of Alexandria, with David Hunter and Moses Hunter as his endorers: that he executed a deed of trust upon two tracts of land in Berkeley county, containing together two hundred and seventy acres, with a new saw mill thereon, and a site for a merchant mill partly improved, to secure his said endorers: that, the Bank of Martinsburg having determined to close its concerns and requiring payment of the said debt, the trust property aforesaid was advertised for sale: that, under these circumstances, a certain William B. King agreed, for the purpose of affording relief to the complainant, to advance for him the sum of twenty-two or three hundred dollars, to relieve him from his debt to the Martinsburg Bank, and one thousand dollars to pay off a debt due to the Farmers' Bank of Winchester, in consideration of your orator's giving the said King one thousand dollars *premium* for the said advances, and executing a deed of trust upon the same property, to secure the payment of the said advances with interest, and also of

the said usurious premium: that this agreement was entered into by the complainant Thomas under the pressure of his circumstances; the money was paid to the Martinsburg Bank and to the Farmers' Bank of Winchester, and the deed of trust was executed upon the terms aforesaid by the complainant Thomas and his wife, and Catharine Gaither; that there were other debts included in the said deed, due to certain individuals, amounting to about six thousand dollars, including the debt due the Merchants' Bank of Alexandria, which amounted to about five hundred dollars: that some time after the execution of the said deed, William B. King directed, that the deed of trust should be carried into execution, and the trustees John R. Cooke and Philip C. Pendleton were proceeding to execute the trust, when the complainant Thomas prevailed with King to suspend the sale under the deed to a future period, in consideration of the complainants' giving him one hundred dollars: that thereupon a new deed was executed, including the new premium of one hundred dollars; the said King, receiving in addition to his legal interest, the sum of eleven hundred dollars: that, as to the debt due the Merchants' Bank of Alexandria (which was also secured by the same deed of trust) the complainants offered to pay it off with their own notes, but the offer was rejected: that the other creditors included in the said deed of trust, were the Williamsport Bank, the Martinsburg Bank for a balance for which Charles D. Stewart was bound, and John Vanmeter: that William B. King required the trustees to proceed to sell the trust property: that the trustees did sell the same on the 1st day of March, 1819, for the sum of six thousand dollars to Alexander Stephens, who purchased for the benefit of King and the other persons concerned, and who never paid one cent of the nominal purchase money: that the property in ordinary times is well worth twenty thousand dollars: that Alexander Stephens, or those interested through him, will proceed to take possession of the trust

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property and to sell the same, unless restrained by the court of chancery. The complainants therefore pray, that the said Alexander Stephens, William B. King, the Merchants' Bank or their assignee James Roberdeau, John R. Cooke and Philip C. Pendleton, and all others interested, may be made defendants to their bill: that the sale, made as aforesaid, may be set aside: that the trustees may be enjoined from taking any steps for taking possession of said property, or selling or disposing of the same: that the complainant Thomas, may be relieved from the said usurious contract with King: and that the defendant Roberdeau, or the Merchants' Bank of Alexandria, may be compelled to receive their own paper in discharge of their own claim; and that the complainants may be suffered to redeem the trust property upon the payment of what is justly due and secured by the said deed.

The chancellor granted the injunction on the 4th of March, 1819.

On the 29th day of September, 1819, the complainants filed another bill, which, in addition to the matters stated in the former bill, alleges the following circumstances: that at the time of the sale, an instrument of writing was executed by the parties interested, by which it was stipulated that if the complainants should pay up the debts due as aforesaid, on or before the 15th of June, then next ensuing, that he should retain the land, but otherwise he should relinquish the possession: that, being both unable to pay the amount and unwilling to pay the usurious debt to King, Stephens, the nominal purchaser, proceeded to dispossess the complainants by a warrant of unlawful detainer, and has in fact obtained a verdict on the said warrant, and an execution of *habere facias possessionem* will immediately issue against the complainants. In consequence of which, they pray that the same defendants may be compelled to answer the premises: that they may be enjoined from proceeding to dispossess the com-

plainants: that the debt due King, may be decreed to be void upon the ground of usury, and themselves and their property discharged therefrom: and that they may be permitted, upon paying off the other demands, to retain the land aforesaid, or that a new sale thereof may be directed to satisfy the said debts, &c. These bills do not call upon the defendant King to confess or deny the usury charged; on the contrary, the latter bill expressly declares, that the complainants "will be fully able to prove the usury, "by disinterested testimony."

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The chancellor awarded the injunction on the 30th of September, 1819.

King, in his answer, alledges, that the value of the land is greatly overrated: that the amount of debts is not correctly stated, which, according to his estimate, is \$ 9,029 92, including the costs attending the execution of the trust: that the complainants are utterly unable to pay the difference between what the land sold for and the said \$ 9,029 92; so that the land may properly be said to have sold for the latter sum: that the sale of the land was injured by the conduct of McPherrin himself, in having published, by his agent, a formal protest against the legality and equity of the said sale, both before and during the sale: that the instrument of writing referred to in the bill, was not made *at the time* of the said sale, as charged in the bill, but many days afterwards. This answer contains no denial of the usury, nor is it noticed in any manner.

The defendant Stewart denies, that the agreement before mentioned, was executed *at the time* of the sale, and agrees with King in his account of the time and manner of its execution. He avers his ignorance of the usury charged on the defendant King, and contends that as his own claim is admitted to be just, the sale ought to be confirmed, so that he and the other fair creditors may be enabled to make sale of the land, and obtain their money.

Stephens, in his answer, says, that he had no other par-

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ticipation in the transaction, than as agent for the parties interested : that the sale was perfectly fair, that the instrument referred to in the bill, was not made until long after the sale, as will appear by the dates : that the land has been since offered for \$8000 without success ; and he prays that the injunction may be dissolved as to him.

The trustees, Pendleton and Cooke, demurred to the bill, because it appears by the complainants' own shewing, that before the filing of the bill and before the service of the original subpoena, they had conveyed the lands in the bill mentioned, and thus fully executed the trust declared by the deed.

Moses Hunter answered, that from motives of kindness, he together with Col. D. Hunter and others became the endorsers for the complainants to a large amount in various banks, mentioned in the bill and answers : that for their own security, they took a deed of trust in the year 1816, on the tract of land mentioned in the bill : that owing to the failure of the complainants to fulfil their bank engagements, suits were instituted against the endorsers, judgments obtained, and executions issued to a large amount ; and the trustees, by the direction of the defendants, were about to sell this land on the 1st of September, 1819, when in consequence of a considerable sum of money being advanced by William B. King, the sale was postponed, and some of the most pressing claims for a time silenced : that it was deemed expedient to have a new deed executed, the names of some of those who were no longer interested struck out, and King's name inserted, for the amount of his interest : that they deny any other connection with the said King : that the defendant and Col. D. Hunter being still bound for large sums for the complainants, and their property being under execution for a considerable sum, they were constrained to insist peremptorily on a sale under this deed ; and upon the 1st day of March 1819, the land was sold, and Alexander Stephens became the purchaser for \$6000 : that the in-

instrument mentioned in the bill was not executed until the 15th of April 1819, and its only design was to give Dr. McPherrin a preference as purchaser, provided he could get money as he expected, in Kentucky ; and if he failed in this, he was, without trouble, immediately to surrender the possession, which had, from motives of kindness, been permitted to remain in him : that there has been no sacrifice of the property : for, it has been repeatedly offered at the amount of debt due upon it, upon a credit, and even for \$ 8000, which is about \$ 1300 short of the amount of debts : and that as the defendant is entirely unconnected with King, he hopes that he and the other parties concerned, will be permitted to take possession of the property which they have fairly bought and paid for.

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David Hunter, the other endorser, answers to the same effect.

The complainants excepted to King's answer, because it does not respond to the material allegation in the bill, that the debt claimed by the said King, and to secure which, the deed of trust was executed in part, was usurious, but is totally silent as to this allegation.

The chancellor overruled the exception.

Many depositions were taken, which chiefly related to the effect of the declaration of McPherrin's agent on the sale of the land, and the value of the land, which is variously estimated, but the usury is not proved.

Upon motion of the defendants to dissolve, the chancellor ordered that the injunction be dissolved as to all the defendants, except the defendant King ; and the trustees are directed to proceed and collect the money for which the land was sold, and (by consent of defendant King, by his counsel,) to pay over to the defendants, Charles D. Stewart, John Vanmeter, Moses T. Hunter, and David Hunter, the full amount of their claims ; and that they retain the balance of the purchase money in their hands, subject to the future order of the court ; and as to the defendant King, the court overruled the said motion.

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On this order an appeal was granted, upon petition, by one of the judges of the court of appeals.

The case was argued in this court by *Leigh*, for the appellants, and *Tucker* and *Stanard*, for the appellees ; but, as it was very fully discussed by the court, the arguments of counsel are omitted.

April 17. The judges delivered their opinion *seriatim*.*

Judge COALTER :

The great question which has been agitated in this case, is one which I shall not now consider at large, inasmuch as, with a bare and divided court, that question cannot be put to rest. My opinion, at present, however, is, that a party cannot come into a court of equity, *for final relief as to the debt itself*, on the ground of usury, and in that court claim a forfeiture of the money actually borrowed. Every case for relief in that court, must be tried on bill and answer; that is to say, the plaintiff cannot claim a right to try the case, without an answer, so as to deprive the defendant of his defence in that way ; and consequently, every case of this kind must be brought under the section of the act of assembly doing away the penalties, so as to authorise the suit. For, without the benefit of that section, the defendant may demur, because he is not bound to answer, and dismiss the bill, so far as it claims relief on the ground of usury.

It is not necessary, to entitle the plaintiff to relief under that section, that he should rely altogether on the oath of the defendant. If he is obliged to shape his bill in that way, it must be because he is not at liberty, when

* Judge Cabell did not sit in this cause.

Note. After the injunction was dissolved by the court of chancery, the appellees took possession of the land under the judgment in the writ of forcible detainer ; and the counsel of the appellants moved the court of appeals, upon notice given to the opposite party, for a writ of restitution or other proper process, to restore the appellants to possession. But the court over-ruled the motion.

he comes in under that section, to prove the usury ; but surely he is at liberty, if it is denied, to prove the usury, and have relief according to that act.

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The case of *Marks and Morris*,⁽ⁱ⁾ was one of a peculiar nature, and rendered necessary in order to prevent those *new-fangled judgment bonds*, as, in this respect they are aptly described, from being used so as to defeat the statute. This court has not considered itself justified in considering these instruments as mortgages generally ; but, surely it will not disturb titles, or be productive of any general mischief, if the court should so consider them, in all cases where usury is alledged ; and should encourage trustees not to execute them, where a court of equity would not, if applied to ; and if they are proceeding, to stop them, so as to oblige the party either to go to law, or to apply to equity, to have the trust executed. No court would reprobate the conduct of a trustee, in refusing to execute such trust, if he was satisfied, by sufficient affidavit or otherwise, that usury was attempted to be covered by the transaction ; and that the party, if he had an opportunity, could prove it. On these principles, which I shall not now dilate on, I think that case can be supported ; otherwise, that it is not law. I was satisfied with that decision on these principles, and still am satisfied with it, but no further.

In this case, however, although the plaintiffs, in their second bill, say they can prove the usury, they nevertheless call for an answer, and except because that charge is not answered to. I think they had a right to that answer, and that the order overruling the exception is erroneous.

The title to relief in this case, so far as the unlawful gain and interest, should the usury be confessed or proved, and which I think is all the relief which can be given, did not in my opinion justify the injunction, even if that

(i) 2 Mun. 407.

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gain was as large as is alledged in the bill ; because, the money admitted to have been borrowed, together with the *bona fide* debts, amounted to as much or more than the land sold for ; and if that charge should not be made out at all, or not to the extent claimed, and as the party gave no additional security, it shews *a fortiori*, that the appellees were entitled to possession, in order to keep down the interest, pending any controversy as to the propriety of the sale. As the injunction, therefore, ought never to have been granted, I think the dissolution of it, at least so far as it has gone, is correct and must be affirmed. Even if that dissolution goes so far as to confirm the sale, I am inclined to think it is right ; because if any loss accrued by forbidding that sale, the appellant may more properly charge that to himself, than to the other party. However, the appellees alledge that such is not the effect of the decree. Understanding it therefore in this way, I can have no hesitation in affirming it *in toto*. The order overruling the exception to the answer, however, must be reversed ; but, as the appellees who are *bona fide* creditors, have no interest in that, and as the injunction was improvidently awarded, and might well have been dissolved as to all the parties, the appellants must pay costs.

Judge BROOKE :

Although this case was re-argued before a full court, yet as one of the judges deems it improper, that he should decide it, and as of consequence, no principle is to be settled by the decision of it, I shall abstain from assigning my reasons at large for the opinion I shall deliver.

The bill is somewhat like the bill filed in the case of *Marks and Morris, (j)* but is susceptible of a different construction ; and as the plaintiff has assigned a different

meaning to it, by excepting to the answer of King, on the ground that it does not respond to the charge of usury, I think the chancellor was too strict in overruling that exception, and that he was premature in dissolving the injunction, and directing the payment of a portion of the money to the innocent creditors; thereby ratifying a sale, which, upon the amended answer of King, may turn out to have been made under an usurious deed of trust. As to him, therefore, so much of the decree as directs the payment of the money to the creditors aforesaid, I think ought to be reversed, and the residue which puts them into the possession of the land, ought to be affirmed.

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Judge ROANE :

The bill in this case states, that so much of the debt secured by the deed of trust, as was due to King, was founded on an usurious contract, "*and which the complainants will be fully able to prove by disinterested testimony.*" It prays that the said King and others may be made defendants, and "*compelled to answer:*" that they may be enjoined from dispossessing the complainants, under a judgment upon a warrant of forcible detainer, that the debt due to King may be decreed to be void, and the complainants and their property discharged therefrom, and for further relief.

The bill in the case of *Marks vs. Morris* was substantially similar to the one before us. After stating that the consideration of the deed of trust, in that case, was an usurious loan of money, and that the contract was made in the presence of, and "*could be proved by a particular witness,*" who is named in the bill, the bill prays a relief similar to that now in question, and that the defendant "*might true answer make to the several allegations thereof.*" In neither of these bills is there any proffer to pay the principal money, as provided by the 3rd section of the act of usury.

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These two bills are therefore precisely alike, both as to the averment that the usury could be proved by testimony other than the answer of the defendant, and as to the general prayer contained therein, perhaps in common with all bills of equity, that the defendants might answer the allegations thereof; and I have no doubt, but that the averment in this case, before mentioned, was thrown into the bill, in consequence of the decision of the court in the case of *Marks vs. Morris*. It was solemnly settled by the court in that case, that while this averment, and the non-existence of any *proffer* of the principal money as aforesaid, withdrew the bill from the operation of the 3rd section of the act of usury, the general prayer before mentioned did not include it. These circumstances, it was also decided, absolved the defendant from the necessity of discovering the usury in that case, under the section aforesaid. If, therefore, it should be considered, that he was nevertheless compellable to make such disclosure, it can only be in consequence of *principles* ulterior to, and independent of, the provision of that section. Let us inquire whether there be any such principles, in the case before us.

As to the discovery now called for, while in relation to a bill coming within the 3rd section aforesaid, the defendant is in all cases bound to make it, upon the terms and conditions therein provided, he may refuse to make it, in relation to all bills not so comprehended. In this country, prior to the enactment of that section in the year 1794, (k) and in England, even up to the present day, if such discovery had been called for, it might have been demurred to, on the ground that it would subject the defendant to the particular penalties and forfeitures, denounced by the act of usury; and that demurrer would have been sustained, unless the plaintiff could shew that he, *alone*, was entitled to those penalties, and *offered*, by his bill, to waive them. (l) This was the case on the ground of

(k) 4 Stat. at Large, p. 39.

(l) Min. 158, 161.

general principles of equity, and independently of the provisions of any statute. But, as the penalties in the case of usury went to the King and the informer, were not vested in the plaintiff, nor could be released by him, a disclosure of the fact by the answer, could not have been obtained in any case; and the right to such disclosure, on the part of the plaintiff, was consequently a mere *non-entity*; it in fact had no real existence. Yet as usury was generally practised in secret, and there was no other evidence of it than that of the usurer himself, this was a case which was deemed to require legislative interposition. It required at least the power of the legislature, to release forfeitures which enured to the benefit of, and were, perhaps, vested in others, and to adjust the terms on which the requisite discovery should be made. But the legislature would not go beyond the actual exigency of the case. It would not invade and release these vested rights, nor relax the statutory restraints established by law against the perpetration of usury, without necessity. It would not interfere, nor has it interfered, in cases in which no discovery from the defendant was needed. It would not carry the provision of the law beyond the actual mischief which called for it. Accordingly we find that in the case of *Marks vs. Morris*, this court expressly limited this 3rd section to the specified case of a plaintiff having no other evidence of the usury than the oath of the defendant, and even hunted up the statute to the *preamble* of the original act on this subject, to shew more clearly, that this was the only mischief that was intended to be remedied, or which required the legislative interposition.

If, therefore, the defendant is compellable to make the disclosure in this case, it is not in virtue of the provision in the 3rd section aforesaid, but on a ground ulterior to, and distinct from it. I have but little doubt, that the legislature meant by that section, to cover the whole ground on the subject of a discovery, and to shelter a defendant from a discovery in *all* cases, not coming within its scope.

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If so, the defendant stands absolved from the necessity of answering, in this particular, by the actual provisions of the statute. But, if this should even be otherwise, he stands so absolved, by virtue of the general principles of equity before mentioned, and under the known inability of the plaintiff to offer (as he has failed to offer in this case) to release the penalties denounced by the act of usury. So that, *quancunque via data*, the defendant was not bound to answer to the usury in this case; and the decree of the chancellor overruling the appellants' exception for want of such answer was entirely correct.

But, it is said or conceded by the plan of a decree, draughted and proposed by one of the other judges, that admitting that the bill as it before stood did not legally require an answer, from the defendant, in this particular, yet as the plaintiff *explains* his intention to be otherwise, by the exception he took to the answer for not responding to the charge of usury, this bill is to be consequently considered, *thereafter*, as a bill requiring such answer. In other words, that plan seems to assume, that this exception has the effect of *amending* the bill in this particular. I had thought, on the contrary, that it was the part and province of the bill, to limit and control the extent of the exception, and that the latter must *succumb*, and conform to the former. I had not supposed, that the exception could limit, enlarge or amend, the actual charges contained in the bill; with the single exception perhaps, that if an exception of that character is made, and is *sustained* by the court, the party making it would be concluded from setting up an objection to it on this ground. Where such exception is overruled, however, as is the case before us, the defendant is not precluded from relying on the judgment in his favor. He is not concluded from averring, that the exception was unwarranted. He is not concluded from resisting any exception, and relying on a judgment overruling it, which seeks to subject him to a disclosure, which he is not compellable, by law, to make. All the

books say that an amendment of a bill can only be made by the *court*, upon *motion*, and generally upon the payment of costs ; whereas the effect of the pretension in question, would be, to make such amendment not only without a motion, but without the payment of costs, and in direct contravention of the 79th section of the chancery law, in this particular. An exception, on the contrary, so far from purporting or affecting to be an amendment, *changing* a bill, *relies* on it as it is, and goes by the *precise* charges stated in it. In point of *form*, it even states and *sets out* "such parts of the bill," as the plaintiff conceives have not been answered, and prays that an answer may be given *thereto*, that is, to the bill as so *set out*, and previously existing. (m) Had the exception in this case been drawn out and extended, it would more clearly have shewn, that however the counsel might therein have misconceived, or departed from, the actual allegations and charges of the bill, as to their legal effect or operation, there was no intention on his part to alter those charges, as existing in the bill ; charges, which so far from being *changed* by any order of the court, or even any act of the plaintiffs, are repeated, kept up, and *set out* in the plaintiff's exception itself. Besides, it must not be forgotten, that if the exception to the answer, in this case, had been *sustained*, the court would have overruled an answer which was clearly correct and unexceptionable *at the time it was put in* ; and have subjected the defendant, nevertheless, to the payment of costs ; which in such cases are to be paid by the defendant, under the 90th section of the chancery law. It would have had this effect too, by means of matter entirely *ex post facto* : which arose *posterior* to the filing of the answer ; which existed only in the will of the plaintiffs, and would have invested them with the enormous and unprecedented power, of making the answer good or bad at their pleasure. It would have condemned an answer as

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being *always* bad, for not responding to a particular charge, *now* for the first time alledged to be contained in the bill; when as at the time that answer was filed, and in relation to which time it ought to be judged, it is confessed there was no semblance of a charge in the bill, making a further answer necessary.

The chancellor could, therefore, have given no other legal decision upon this exception, without injury to the defendant King; and on the contrary, the only just complaint on the part of the plaintiffs is against themselves. They can at most only regret that they did not, in fact, so frame their bill as to require a discovery of the usury, and call for a different decision from the court.

No usury is, therefore, *confessed* in this case, nor was the defendant *compellable* to confess it. But it was argued by the appellants, that such a confession is to be *inferred* from the silence of the answer in this particular; on the authority of the case of *Scott vs. Gibbon*,⁽ⁿ⁾ in this court. I have examined that case, and do not find that that broad doctrine is at all established by it. Only one of the judges (judge Coalter) said any thing which could countenance such an idea. All that is said by the court seeming like it, is, that it was "*conceded*" that the deed was executed *prior* to the marriage; but it does not follow, that in the opinion of the court, that concession was grounded on the silence of the defendant's answer, in this particular. On the contrary, that fact might have been conceded at the bar; or, more probably, it was inferred by the court to be conceded by various provisions comprized in the deed itself, from the circumstance that the *date* of the deed was anterior to the time of the marriage, and from the female appellant being called therein, *Mary Davis*, and not *Mary Scott*, as she was, and would have been, called, *after* the marriage. Be that however, as it may, the court certainly has not grounded the *concession* it mentions, upon the mere silence of the answer, only.

The usury as to King's debt (the only usury that is pretended) is not only not confessed, therefore, as aforesaid, but neither is it *proved*; the consequence is, that the decree is erroneous and injurious to King in not dissolving the injunction as to him, and it ought to be so far reversed in his favor.

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This view of the subject would have made it unnecessary for me to say any thing as to the relief which is to be given, in the case of a decree rendered upon the *proofs* in the cause, and in exclusion of the answer of the defendant, had it not been for a clause in the proposed decree, seeming to leave the matter, at least, in doubt. That plan at least forbears positively to decide, whether it is competent to a plaintiff to file a bill for relief against usury, in that bill to *dispense* with the answer of the defendant touching the same, and yet go on upon the *proofs* to get relief. I trust I have shewn that it is competent to a plaintiff to *dispense* with the answer, so far as it depends on his coercion, in such a case, and this plaintiff has, in fact, done so. He has done so, by not bringing his bill within the provision of the 3rd section of the act against usury. Yet he is not to be deprived of his relief, if, upon the *proofs*, he shews himself to be entitled to it. In such case, the cause proceeds and goes on, as to all the parts of the bill, except those which the defendant is excused, at his own election, from answering. It proceeds as to the charge that there is usury in the transaction, although it is arrested as to so much of that charge, as relates to a discovery of the fact from the defendant. But at any rate, if there should be supposed to be a defect of an *issue* as to the usury itself, for want of a discovery of that fact by the defendant, an *issue* on that point ought to be directed. Thus we are told(o) that a party shall not protect himself against *relief*, by alledging that if he answer he must subject himself to penalties or forfeitures; for,

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that although the court cannot subject him thereto, by means of his own oath, yet it will entertain jurisdiction for relief; and therefore, on a demurrer to a bill, suggesting a forgery of the deeds, the court *directed an issue* to try whether they were forged or not. (p) I am inclined to think under the *practice* in this country, at least, this issue is entirely superfluous and unnecessary; and that the question of usury would be considered as substantially put in issue, *quoad* the proofs, existing in the cause; and from which charge, the defendant only withdrew himself, so far as relates to his own answer, by availing himself of a privilege existing in his own favor. Be this however, as it may, it is ~~is~~ certain that in *some* mode, relief in such cases is to be obtained; and that, that which, at most, is to be considered as a demurrer to a *part* of a bill, cannot, by a contrary course, be converted, at the pleasure of the defendant, into a demurrer to the *whole* bill.

For these reasons, I can by no means agree to the plan of a decree which has been proposed. I cannot for a moment doubt with that plan, whether it is competent for the plaintiff to *dispense* (as in this case he has dispensed) with the answer of the defendant, as to the alledged usury, and yet go on upon the *proofs* to get a decree against him. This is not to be complained of on the part of the defendant, because although it is competent to the plaintiff to decline coercing his answer, the defendant may yet give it in, if he pleases. I cannot doubt, but that this relief is to be obtained, either in the usual mode, or *at least* by means of an *issue* as above is stated. I cannot concur with the plan aforesaid, that the appellants have done any thing in this case, which has *legally* retracted the dispensation originally contained in *their* bill, or has legally *amended* their bill in this particular. I cannot agree to so much of that plan, as seems to *admit* that King's answer ought yet to come in. Such an answer ought not to be coerced

in this case, for the reasons I have already assigned, until the character of the bill should be essentially changed. Nor can I agree with that plan, to revise an order overruling an exception of the plaintiffs, which their own bill prohibited and estopped them from making; which order too only sustained an answer which was strictly correct and proper at the time, and is yet entirely proper, in relation to the actual character of the bill before us.

My opinion therefore would be, to reverse the decree, to dissolve so much of the injunction as relates to King, and suspends the collection and payment to him of his portion of the sales of the land in question, and affirm it for the residue. I would so decide, because usury as to him being neither confessed nor proved in the cause, his, also, as it at present appears, is a just and valid debt; but on this reversal, although made on the appeal of the other party, King should be allowed his costs, as the party substantially prevailing.

With respect to the particular measure of relief which, in a case like this, is to be afforded, it will be time enough, in my opinion, to settle that matter, when a case shall occur, in which the usury shall be established. Then too, we may possibly have a fuller court. The question is very important; and its importance is enhanced by the circumstance, that the counsel have arrayed two of the decisions of this court against each other. It therefore demands and ought to receive an insulated and solemn consideration. I beg that it may be *distinctly* understood that I have no *settled* and *conclusive* opinion either way, upon the subject. I wish to be left *entirely free* upon it, as I shall hereafter determine; any thing in the decisions aforesaid, to the contrary notwithstanding. As for those decisions, my *impression* was, that in deciding the case of *Marks vs. Morris*, the clear opinion of the court was, that no part of the sum borrowed was to be paid, as the price of relief, except the plaintiff brought himself within the provision of the 3rd section of the act of usury; and

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that this opinion was not abandoned, by stating and relying, in the decision of the court, upon the perhaps stronger case of a deed of trust, which was the case then before the court. That case too was very solemnly considered upon the point now immediately in question. While I am found, to have also concurred in rendering the decree in the case of *Stone vs. Ware*, (q) and may, hereafter, adhere to the opinion which seems, as to this point, to have been declared in it, I am not at present entirely satisfied with that decision, and wish for a further consideration of it. I wish a point to be reconsidered and solemnly settled by a fuller court, on which I not only doubt as aforesaid, but which is so radical and important, as, if adhered to, pursuant to that decision, goes a great way to repeal the salutary provisions of the act of usury. With respect to the case of *Stone vs. Ware*, I regret to find that it has been pressed upon us, as a conclusive and binding authority. It is well known that I have often expressed my doubts of its correctness, on this point, in conference and elsewhere. I must always be left as free to suspend or retract my opinions, which are believed to be doubtful or erroneous, as to declare them in the first instance. Having doubts, at this time, of the correctness of that decision, I must be permitted to withdraw my concurrence therein, at least for a time; and I do withdraw it accordingly. That withdrawal leaves it to stand, at most, upon the decisions of two judges, and thus deprives it, for a while, of its power to settle the law upon the subject. I have a distinct recollection, that that case was not so much considered on this point, as that of *Marks and Morris*; and that it passed towards the end of a term, amid a great mass of other business. I have also a vague impression, that it received the entire assent of only one of the judges. Be that however as it may, the report itself shews, that while that case was decided somewhat more at large upon the princi-

pal question, only a single sentence or *dictum* is devoted by the court, to this subject of the measure of relief.

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On the new hearing, which shall be given of this question hereafter, I wish it to be maturely considered, whether a principle as to the measure of relief, which in England is said to be universal, (in which country there is no statutory provision on the subject,) is to be considered equally universal here, where that subject has been taken up and acted upon, by the legislature? Whether the act alluded to, did not mean to repeal that principle, so far as it is *ulterior* to the actual provision, made by the 3rd section of it? And whether that section does not comprize the full extent of the legislative will, as to the compensation to be made, in cases of usury? I wish it to be well considered, whether *that* is a sound and natural construction on the subject, which compels a plaintiff who wants no aid from the defendant, and receives none from him, to pay a higher *premium* for his relief, than one who is solely dependent on the defendant for his testimony, and only grounds his recovery, upon the evidence coerced from him? I wish it to be considered, whether the plaintiff can avail himself, in this country, of the highly objectionable principle of "*all and some*," from the benefit of which principle he is excluded in England, by the non-existence of any statute whatsoever, on the subject of compensation? I wish it to be considered, whether an offence which is reprobated by our laws, and is highly detrimental to the best interests of the community, should be almost *invited* by a construction which imposes on the usurer, only the paltry loss of the usurious interest? I wish to know, whether a contract which is *doubly* reprobated, should, by that clause in our act, which declares all usurious contracts to be *utterly void*, and secondly by the want of that free will, which, on general principles, is held to be essential to the validity of *all* contracts, and which the party borrowing, is now held to be deprived of, by reason of the *duress* of his situation, is yet to be set

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up and carried into effect, as to all but the paltry pittance of the usurious interest? I wish it to be considered, whether a principle (admitting it were not controlled by *any* statute,) is still to be kept up and acted upon, now that the borrower is held to be deserving of compassion, which was settled in England at a time when he was held to be equally guilty with the usurer? And whether the same severe necessity, which has deprived the borrower of his free will, and placed him in the list of those deserving pity and compassion, will not equally excuse him from refunding the money, which his necessities may also have made impossible, as for having borrowed it in the first instance? I wish it also to be considered, whether a court of equity will not, as much as a court of law, “interfere to prohibit the *effect* of contracts made in violation of laws enacted for the public good,” as was lately decided by this court in the case of *McGuire vs. Ashby*.^(r) In addition to the possible effect resulting from the passing the act of 1734^(s) on this subject of compensation, alluded to above, I wish the effect of two other acts, in relation to it, to be also considered. By the aforesaid act of 1734, § 2, all usurious contracts made *prior* to the commencement of the act of 1730, ch. 12,^(t) are declared to be void as to all interest “*over and above the said £ 6 in the hundred per annum;*” and a similar provision is made by the act of 1748, § 4,^(u) as to all usurious contracts made *prior* to November 1734, the time of the commencement of the act of 1734 aforesaid. These old acts, therefore, in relation to the times *prior* to the 10th of November 1734, had in fact *legalized* usurious contracts *up to* the point of the principal and *lawful* interest. *That*, therefore, which, in England, depended only upon the *construction* of a court of equity, in relation to the measure of the relief, had received in this country the form and sanction of a *legislative act*.

(r) Ante p. 101.

(s) 4 Stat. at Large, p. 396.

(t) *Id.* p. 295.

(u) 6 Stat. at Large, p. 103.

The legislature carried into that act, as being more solemn and binding, the *principle* existing in the courts of equity as aforesaid; yet in legislating *prospectively*, from the 10th of November, 1734, that law was repealed, and with it most probably, the *principle* of which it was but a recognition and reiteration. I wish to know, whether there is any just principle, which, when an act is repealed, which only reiterates and legalizes a principle of construction, at the same time *preserves* that principle in existence? Do not the act and the principle declared by the act, fall together? If an old statute is exactly *repeated* in a new one, or in a revival of the laws, and the *new* or the *revising* act is repealed, does the old law still remain in force? And if this be not so, in general, as to an act or a principle, does not the construction equally hold, in a case in which the former legislative act is not entirely revoked, but is succeeded by *another*, which provides, at least in part, for the case embraced by the former? Does not the old law or principle also stand *changed* with the new? I wish it further to be considered, whether, under such a clear change of the legislative mind on this subject, as that I have just mentioned, and under an utter destitution of any *statutory* measure of compensation, except that which is embraced by the 3rd section of the act of usury, we can either say that there is any statute or any *principle* applying to the case of compensation, except that provided by that section?

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These are *some* of the considerations which have caused me to *doubt* on this subject; and I now merely throw them out, for the consideration of counsel, when the question shall again come before us. I repeat, however, that I have no conclusive opinion upon the subject, and that my mind is open to conviction on it. The subject is too important in its effects and consequences, to be settled without the fullest consideration.

The following was entered as the decree of the court :
" This day came the parties &c., and the court &c. is of
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“ opinion, that the chancellor erred in overruling the exception to the answer of the appellee King, instead of sustaining the same, and ordering him to put in a more sufficient answer. The court is further of opinion, that there is no error in the said order of dissolution so far as it goes, but that the said court of chancery ought also to have dissolved the injunction as to the appellee King ; therefore it is decreed and ordered, that the said order, so far as the same is approved as aforesaid, be affirmed, and that the appellants do pay unto the appellees their costs, &c. And it is ordered, that the cause be remanded to the said court of chancery to be further proceeded in, pursuant to the principles of this decree.”

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Tidball against Lupton.

A testator devises a tract of land to his daughter H. L. “ *and to her and the heirs of her body, and to them and their heirs and assigns for ever ;*” and afterwards adds, “ *if my daughter H. L. should decease, not having any lawful heirs of her body,*” that then the land should become the property of his son D. L. These words convey an estate tail to H. L., and not a life estate.

This was an ejectment, brought in the Superior court of law for the county of Frederick, on the demise of David Lupton. against Joseph Tidball, for a “ certain piece and parcel of land with the appurtenances,” situate in the county of Frederick, and containing 548 acres. The parties agreed upon a statement of facts, to be considered as a special verdict, which is, in substance, as follows : Joseph Lupton being seised in fee of the premises in the declaration mentioned, made his will, dated the 1st day of September, 1791. After devising different parts of his

real estate to his other children in fee simple, he makes the following devise to his daughter Hannah Lupton :
 “ Item, I devise unto my daughter Hannah Lupton and to
 “ her and the heirs of her body, (and to them and their
 “ heirs and assigns forever,) the plantation whereon I now
 “ live, containing three hundred and sixteen acres, be the
 “ same more or less, situate, lying and being in Frede-
 “ rick county, near the borough of Winchester. And that
 “ the said Hannah Lupton may occupy, possess and enjoy
 “ all the above mentioned premises, except what’s before
 “ excepted. And that also at the decease of my wife
 “ Rachael Lupton. She the said Hannah Lupton, or her
 “ heir yielding and paying unto her mother, Rachael Lupton,
 “ yearly and every year, the just and full sum of
 “ twelve pounds Virginia currency, during her natural
 “ life.

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“ And I also will and ordain, that if my daughter Hannah should decease, not having any lawful heirs of her body, that then the aforesaid three hundred and sixteen acres of land shall become the actual property of my son David Lupton, his heirs and assigns forever.”

The testator then devises to his said daughter Hannah another tract of land, with the same condition, that if she should die, “ not having any lawful heirs of her body,” it shall become the property of his son David Lupton.

Hannah Lupton afterwards married Thomas Evans, and died in his lifetime on the day of 1813, without having had any child or children.

Thomas Evans and his wife Hannah, on the 5th day of February 1801, being in possession of the premises aforesaid (which are parcel of the land in the declaration mentioned) conveyed the same, by deed of bargain and sale, to Adam Douglass; which deed, with the privy examination of the said Hannah, was duly proved and recorded.

Adam Douglass afterwards conveyed the said land to Joseph Tidball, the present defendant, who is now in possession.

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The parties agree, that if the law be for the plaintiff, judgment shall be rendered for him, for his term yet unexpired in the lands in the declaration mentioned and one cent damage; and if the law be for the defendant, that judgment shall be rendered for him.

Upon this agreed case, the superior court gave judgment for the plaintiff; and the defendant appealed to this court.

The case was argued in this court by *Gilmer* and *Leigh* for the appellant; and by *Nicholas*, *Tucker* and *Wickham*, for the appellee.*

April 17. The judges delivered the following opinions.†

Judge COALTER:

I shall first consider what estate *Hannah Lupton* took under the clause, devising the land "to her and to the heirs of her body, and to them and their heirs and as-signs forever." independently of the clause, "that if she should decease not having any lawful heirs of her body," then to *David Lupton*, and as if this latter clause was not in the will. I shall next consider, what effect that clause will have.

That the word *heirs*, as well as *issue*, may be construed a word of purchase, as descriptive of the persons to take, if that shall appear to be the intention of the testator, and is not necessarily a word of limitation, appears to me to be settled law. This has been settled in England in many cases, of which *Archer's case*, (a) the case of *Doe vs. Laming*, (b) *Perrin vs. Blake*, (c) *Lisle vs. Puller*, (d) and *Bagshaw vs. Spencer*, (e) are examples or proofs.

* The reporter not having been present at the argument of this case, is unable to give a report of it.

† Judge Cabell was absent.

(a) 2 Co. 66.

(b) 2 Burr. 1100.

(c) 4 Burr. 2579.

(d) 2 Stra. 799.

(e) 2 Atk. 246, 577.

The same doctrine has been recognized in this court in various cases, and amongst others, in *Roy vs. Garnet*, (f) and in *Warner vs. Mason*. (g)

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This intention is sometimes manifested by superadding words of inheritance or limitation to the word *heirs*, so as to shew that they were to be a new stock, or *terminus a quo*, the inheritance was to descend; sometimes the intention has been manifested by other provisions and expressions in the will, equally going to shew, that the legal operation of the word *heirs*, as a word of limitation, is controlled, and converted into a word of purchase; the intention being that they shall take as purchasers, not in the course of descent.

There is nothing illegal or contrary to the rules of law, in such intention. The only questions are, whether the persons intended to take are sufficiently described? And can they, as *purchasers*, take what it was intended they should take?

This, I believe, is the first case, except that of *Roy and Garnet*, which has come before this court, in which the construction has arisen from words of limitation being superadded to the word *heirs*.

In that case, the testator devised the land, "to his son James for and during his natural life, remainder in trust for the use of the first and every other son of his son James, *who shall survive him*, in tail male, equally to be divided." It is clear, from the opinion expressed by the president of the court, that had the will stopped here, the life estate of James would not have been enlarged, and that the surviving sons not only might, but would, necessarily, take as purchasers, not in succession, but as tenants in common. But the will did not stop here. It is further provided, "but if my son James should die without *male issue*, then I give to Moscoe, &c." It was contended, that the words *male issue* must be construed *such*

(f) 2 Wash. 9.

(g) 5 Mun. 242.

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issue male, that is, a son or sons surviving. On the other side it was admitted, that if there be a devise to A, remainder to all his sons in tail, and if he die without issue male, then to B, that these latter words will not enlarge the estate previously given, because as the first part of the devise had comprehended *all the issue male*, the latter part can have reference to none other, and therefore shall be construed to mean *such* issue male; for, the whole male issue being comprehended, there is no necessity to enlarge the meaning of the latter words. But as in this case *all the issue male* were not comprehended in the first clause; as the sons of a deceased son would be excluded, and as the second clause clearly shewed an intention to comprehend *all the male issue*, it was necessary, in order to effect this general intention, that James should be considered as taking a fee tail by implication.

Such was the opinion of the president and some of the other judges. But there being some doubts with some of the other judges, they all concurred finally in a decision, on the ground of the trust created by the will.

In the case before us, it is true that the devise to Hannah is not expressly for life, and no longer; but there are expressions in the will, such as "that she may occupy, possess and enjoy," &c. which go to shew, that he did not consider her as taking a larger estate; but she will take a fee tail by the clause now under consideration, unless the words *heirs of her body* are to be construed as meaning such persons as, at the time of her death, were issue of her body, and being so, were intended to take in fee. If this was the intention of the testator, then she only took for life. If this was not his intention in this clause, what was it?

He did not intend, that she should take a fee simple; otherwise, he would have given it to her, in the same way in which he gave a fee to his other children.

Did he intend to give her, *in explicit terms*, a fee tail? That can hardly be presumed; because he most probably

knew that would be, in fact, to give her a fee. If he, however, did not know that would be the effect, and intended a fee tail, he would have been satisfied with creating it in the ordinary way, and would not have super-added words, giving a fee simple to the issue in tail, and which, in fact, was incompatible with the estate tail, he is supposed to be creating. The very circumstance, that the heirs of the body are not to take as issue in tail, but in fee, repels the idea that he intended, by this clause, to create an estate tail, in the usual way. But we must affix some meaning to it ; and I can see none but that which is above stated. Suppose he had expressly said, “ not “ knowing whether my daughter Hannah may ever marry, or whether she will marry a provident man or not, “ I give her such a tract of land, to occupy and enjoy “ during her life ; then I give the same to all the issue of “ her body who shall survive her, whether children or “ the descendants of children, to them, their heirs and assigns forever, share and share alike.” The only thing that could be said against the propriety and reasonableness of this would be, that grandchildren would take *per capita*, and not *per stirpes* ; but the testator might well think, that even this would be better, than that the whole should be cut out, by the alienation of the mother, or that, never having had issue, she might devise it out of his family.

Taking this clause as the only one in the will, and supposing that there was no other, in relation to this subject, I would feel much safer in putting this construction on it, than that which would consider it an estate tail in Hannah.

But there is another clause, which, I will admit, (if all the heirs of the body are not provided for, in that which I have just considered,) must, as in the case of *Roy* and *Garnet*, shew an intention, which, because it cannot be effected but by construing the estate in Hannah to be one in tail, must, for that reason, so enlarge it, although the effect of that must be totally to defeat the will. This di-

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lemma, it seems, we cannot avoid in this country. It however is one, which will not make the courts *astute* in implying estates tail, but in my opinion, the reverse.

But the issue are all provided for by the first clause, according to my construction; nay *better* provided for, as they are to take in fee. It is not necessary, therefore, to enlarge the estate in Hannab, which would have the effect of cutting down this fee simple in the issue, if estates tail were permitted here, in order to provide for the whole issue of the body. It is true, grandchildren may take *per capita*; but the testator had a right to do this. The provision may be a little greater to them; but shall we say that these after-words were intended to destroy the fee in the issue, and that they should stand merely as issue in tail; and that too in a country where there is no such estate known in the law?

If I am right in my exposition of the first clause, I can only expound this second as meaning, "if at the death of my daughter Hannab, there is no such person in being as I have above described, then the estate is to go to my son, David Lupton."

For what purpose shall we expound these words as meaning any thing more? The two clauses ought to stand together if they can do so, giving each a reasonable interpretation. The first clause either gave an estate tail, or it did not. If it did, then it is not necessary to resort to the second in order to give it. If it did not, then is there any ulterior provision or intention in the second clause, to effect which it is imperiously necessary to give it such operation as to destroy the meaning of the first? I can see none. On the contrary, to convert the estate into a tail is entirely to defeat the intention, supposing it to be either the one or the other.

For these reasons, as at present advised, I cannot concur in reversing the judgment. If my opinion was to have the effect of affirming it, I might take more time to satisfy myself on the subject. But, as this is perhaps the

first case in this court, in which the construction is placed on the superadded words of limitation ; and, as from the change of the course of descents, and the destruction of estates tail, by our acts, those words may be entitled to even greater weight here, than in England, in ascertaining their intention, I prefer leaving the question open for further consideration, should that hereafter be found to be necessary.

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In England, the estate is enlarged in order to effect the intention, and that the fee may go as near as may be, according to that intention. Here we enlarge it, because the after words can receive no other fair construction ; and as they cannot be rejected, we must suppose the testator intended an estate, which cannot exist, according to our laws, and that the intention therefore must be defeated, not by the court, but by the law. Where, however, we can give both clauses a reasonable interpretation, so that both can stand and have effect, I think we ought to do so.

Judge BROOKE, was of opinion, that the judgment of the superior court ought to be reversed.

Judge ROANE :

The construction in this case depends upon two clauses in the will of Joseph Lupton, dated the 9th of March, 1791. By the first of those clauses, he devises the premises in question to his daughter "Hannah Lupton and to *her* and the heirs of her body, and to *them* and their heirs and assigns forever." These expressions "*and to her,*" and "*to them,*" while they are awkward expressions, are mere pleonasms in language. They express nothing more than the clause imported without them. This is evident, not only from a mere reading of the clause itself, but also from observing that the same form of expression is used in most of the other devises in the will, and in which an estate of inheritance in the first taker, was clearly intended. The first expression, "*and to her,*"

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still only means Hannah Lupton, and it is to be construed as if after the word "her," the words "the said Hannah Lupton" (which are *understood*) had been inserted; and the second expression "and to them" is also to be construed in like manner. It is to be construed, as if the words "the said heirs of her body" which are also understood, had been expressly repeated, immediately following the word "them:" and in that case, the clause would stand thus, "and to them the said heirs of the body of Hannah Lupton and their heirs and assigns forever." This reading would cut up by the roots, all pretension, that under the word "them" is understood, a different idea of the character of the parties, from that which was conveyed by the previous words "heirs of her body," and that the words last mentioned, which are clearly words of limitation, are to be thereby converted into words of purchase. On no other ground than this, can it be contended that Hannah only took a *life* estate, and that the heirs of her body, (in exclusion of her,) took, as a new stock and as purchasers, the inheritance of the estate in question. It must here be remarked, that the words in this case "to Hannah Lupton and the heirs of her body," are peculiarly strong and appropriate to shew, that they take by way of limitation, and that these heirs must be understood to take in *succession*; and there is nothing in the will to shew a contrary intention. In the case of *Doe vs. Laming*, (*h*) the devise was precisely like the clause before us, throwing out the superfluous words I have above remarked upon, and with the exception that there were some circumstances and expressions in that case, not existing in *this*, which caused the words to be construed, in that case, as words of purchase. There is an exact similitude between that case and this, in the devise being to "A, and the heirs of her body, and to their heirs and assigns forever." Although that devise was adjudged to

give an estate by purchase, and not by limitation, to the heirs of the body of A, it was not so adjudged by reason of the *last*, or superfluous words in the devise contained; nor even by reason of the term "assigns," which is therein used. Had there been nothing else in that case than in this devise as I have stated it, the estate would have been adjudged to be a limitation, and not a purchase. But, there were such other and *ulterior* circumstances in that case, and on the ground of them, only, the decision of the court was founded. In the first place, after the words *heirs of her body lawfully begotten*, were inserted the words "as well females as males," and the estate was to be *divided equally* between them; which division seemed inconsistent with the idea of a *succession* of the heirs; and secondly and *principally*, as the lands were Gavelkind lands, and it was the testator's clear intention to provide for her *female* heirs, as well as male, which would not take place, in that tenure, by construing the clause to be a limitation, the words were construed to be words of purchase, to let in these females, and effectuate the manifest intention of the testator. But for these circumstances, and particularly the last, the words would have been construed to be words of *limitation*, and not words of purchase.

But in the case before us, there are no words importing that the heirs were not to take in succession. On the contrary, the *next* clause clearly manifests that idea in the most explicit terms. Again; there is nothing in *this* will, like the one just mentioned, whereby, by construing the words in their natural and ordinary sense, the intention of the testator would be frustrated. I do not see that that effect could be any how produced, by referring to our act of descents, if we were at liberty to do so. But we have not that liberty. We are confined in our construction, in this particular, both by the terms of the acts of 1776 and 1785, and by the decisions of this court, upon them. All these have referred to the *lex temporis*, on this subject, and have adopted it as the rule. They have adopted the law on this subject, as it stood in the year 1776.

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am therefore clearly of opinion, that if there were
 ing else in this will than the first clause, Hannah
 Lupton took an estate tail in the premises in question.
 But there is another clause in that will, which is still more
 conclusive on the subject. By that clause it is provided,
 that, if Hannah Lupton should die "*not having any law-
 ful heirs of her body,*" then the land aforesaid should go to
 David Lupton. Whatever may be said of the first clause,
 this clause makes the testator's meaning more explicit;
 and if necessary, it would be construed even to alter the
 first clause, in this respect. This last clause clearly gives
 an implied estate tail, to Hannah. This construction is
 made still more clear by *another* clause in favor of Han-
 nah, immediately succeeding, in relation to *another* tract
 of land, couched in precisely the same form of words,
 with this difference only, that the words giving the *im-
 plied* entail, as aforesaid, are in the same clause, with the
 previous words. It must at least be allowed to a testator
 to correct and explain his meaning by the *subsequent* words
 of the *same* clause in his will. To say nothing of other
 cases on this subject, those of *Hill and Burrow,*(i) *Tale*
and Talley,(j) *Eldridge and Fisher,*(k) *Allen and Par-*
ham,(l) and *Sydnor and Sydnor,*(m) in this court, equal-
 ly shew, that a devise, like that before us, carries an estate
 tail *by implication*, and comes within the operation of the
 act of 1776, upon the subject.

If any support was wanting to this construction, from
 the English cases, it may readily be found. One case
 which is more than in point, is found in *Morris vs. Gray,*(n)
 and in *Fearne.*(o) In that case the devise was to L
 "*for life and then to the heirs of the body of L, and their*
heirs, and if she died without such heir of her body, then
over :" and it was held to be an estate tail in L. That

(i) 3 Call, 342.

(j) *Ib.* 354.

(k) 1 H. and M. 559.

(l) 5 Mun. 467.

(m) 2 Mun. 263.

(n) Cited in 2 Burr. 1102.

(o) p. 119.

case is even stronger than the case before us, against the idea of an estate tail, in this ; that the devise was to L, *for life* : but even that circumstance did not prevent the construction aforesaid : And the last words, *and if she died without such heir*, like the last clause in the will before us, clinched that construction, and manifestly imported an estate tail in L, notwithstanding the words *for life* therein used ; which, however, are not found in the case before us.

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On the first clause in this will, therefore, standing singly, I should be clearly of opinion, that Hannah Lupton took an estate tail in the land in question ; but that construction is put beyond all doubt by the clause last mentioned. The result of which is that, in my opinion, the judgment before us must be reversed, and entered for the appellant. Judgment reversed.

1853.
April.



Toll bridge against Free bridge.

Where an injunction is refused by a chancellor in *open court*, it is competent for a *judge* of the court of appeals, *out of court*, to award it.

A judge of the court of appeals may award an injunction which has been refused by a chancellor *in court*, upon an *office copy* of the record in the chancery court, being presented to him, as well as upon the *original bill* itself.

Where an injunction has been so awarded by a judge of the court of appeals, the chancellor ought to restrain any disobedience to that order, by attachment or other proper process.

This was an appeal from the chancery court of Lynchburg.

The case was shortly this : The legislature, by an act passed on the 18th day of February, 1812, authorised the erection of a toll bridge over James river, at Lynchburg, and incorporated a company, for that purpose.

On the 24th day of February, 1818, another act was passed, authorising certain trustees, to build a free bridge across the same river, a few hundred yards above the toll bridge ; but, providing as a protection to the interest of the toll bridge, that when the free bridge should be completed, the trustees should apply to the court of Hustings in Lynchburg, for the appointment of commissioners, to ascertain the balance which would be due to the toll bridge, by deducting from the sum of their advances with interest, the amount of dividends, which they had received ; that this balance should be deposited in court by the trustees of the free bridge, for the use of the toll bridge ; and that until that was done, no person should pass the free bridge, or transport any thing over it, under the penalty of double tolls, to be recovered by the toll bridge.

Under this act, the free bridge was so far erected, as to be conveniently practicable for horse and foot passengers. In this situation, the free bridge being in daily

use, and by the trustees themselves, and the penalty of double tolls being an insufficient remedy, the appellants exhibited their bill, before the Lynchburg chancery court, against the trustees of the free bridge, praying an injunction to restrain them from using the said bridge, or permitting it to be used by others, until the condition of the law should be complied with, by paying to the toll bridge the balance, which would be due them on the settlement of their accounts, which they shewed would be about \$ 13,000.

1822.
April.

Toll
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bridge.

The court made a rule on the trustees of the free bridge, to shew cause why the injunction should not be granted ; and on the return thereof, and the filing of some affidavits, discharged the rule, and denied the injunction.

On an office copy of the record, two of the judges of the court of appeals awarded the injunction.

The defendants answered separately, none of them denying any material allegation in the bill, except Mitchell, and he not denying any of importance, which is not sufficiently established by the evidence.

At the October term 1821, the plaintiffs, upon affidavits that the injunction had been violated, obtained a rule against four of the defendants, Mitchell, Rucker, Harrison and Lee, to shew cause why an attachment should not be awarded against them.

Sundry affidavits of witnesses, upon the merits and on the rule for the attachment, were filed ; together with the affidavits of the defendants, exculpating themselves from the charge of having violated the injunction. These affidavits are not important to the present report.

On the return of the rule for the attachment, it was discharged by the court, and the injunction dissolved, as having been improvidently awarded. The chancellor made two objections to the injunction : 1st, that as it was awarded in *open court*, it was not competent for a judge of the court of appeals, *out of court*, to award the injunc-

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tion. 2dly, that the law did not authorise a judge of the court of appeals to award an injunction upon a *transcript* of the record of the chancery court, but only upon the *original bill* itself, with the certificate of the chancellor, refusing the injunction. In support of these positions, he referred to the act of assembly (a) on that subject.

The plaintiffs appealed to this court.

C. Johnson for the appellants ; no counsel for the appellees.

April 19. Judge BROOKE, delivered the opinion of the court.*

The court is of opinion, that the injunction was regularly awarded by two of the judges of this court ; and is further of opinion, that the decree of the chancellor, discharging the rule for the attachment and dissolving the injunction, is erroneous. It is therefore reversed ; and this court proceeding &c., the injunction is re-instated, and the cause is remanded for further proceedings, in which effectual measures are to be taken to prevent the use of the free bridge, except for the purpose of completing the construction thereof, until the terms are complied with, which are directed by the act in relation thereto.

(a) Rev. Code of 1819, vol. 1, p. 205, § 44.

* Judge Boone absent from indisposition.

Johnson against Mitchell.

1822.
October.



Where a legacy is left in trust and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee is appointed by the Court of Chancery, and is not chargeable with interest, before the decree.

This was an appeal from the Richmond chancery court, where Barbara H. Johnson, by Francis Johnson, her husband and next friend, brought a suit against William Mitchell, acting executor of Thomas Mitchell, deceased, to recover a legacy which had been left to the said Barbara, by her father, the said Thomas Mitchell. By the will of the said Thomas, two thousand pounds were bequeathed to Thomas Johnson, in trust for the use and benefit of his daughter Barbara H. Johnson, during her coverture with Francis Johnson, and in case she should die during the life of the said Francis, then the legacy was to be equally divided among all the children of the said Barbara; but, if the said Francis should die, living the said Barbara, then, and in that case, she was to have the said legacy absolutely. Thomas Johnson, the trustee, refused to act; whereupon the court of chancery, by consent of parties, appointed William Quarles, trustee, to receive the said legacy, upon his giving bond and security in the amount of 4000*l.* conditioned to hold the said legacy, to be applied as the will directed. Upon the execution of the bond, approved by the commissioner, the chancellor decreed, that, "as there was not heretofore any person legally authorised to receive the legacy in question, interest thereon should not be paid but from the date *"hereof,"* and that the defendant should pay the legacy aforesaid, to the said William Quarles, to be held by him in trust, for the said Barbara H. Johnson, as directed by the said testator's will, with interest thereon from the date of the decree, until paid.

1832.
October.

Johnson
vs.
Mitchell.

From this decree the plaintiff appealed.

Nicholas, for the appellant, contended, that under the circumstances of this case, interest should have been allowed after a year from the qualification of the executor. The general rule is established by many cases, particularly by *Jolliffe vs. Crew*,^(a) *Granberry vs. Granberry*,^(b) and many others.^(c) Indeed, there are cases in which interest runs from the death of the testator.^(d) One of these cases is, where *maintenance* of a child is the object. Here the appellant was the child of the testator. The want of a trustee is of no consequence, since a court of equity would at all times have supplied that want, and it was the duty of the executor to have filed a bill against the first trustee, and bring the money into court.^(e)

W. Hay, junr. for the appellee, relied upon the case of *Cavendish vs. Fleming*,^(f) as an express decision in point, to prove that where there is no hand to receive a legacy, interest upon it ought not to be charged, it not appearing that the executor *made* interest with the money.

Nicholas replied.

October 19. Judge BROOKE, delivered the opinion of the court, consisting of judges Brooke, Coalter and Green.*

It appearing that no person was authorised to receive the legacy, and it not appearing affirmatively, that the executor or his testator's estate, received interest on the fund out of which the legacy was payable, under the authority of the case of *Cavendish vs. Fleming*, in this court, the court affirms the decree.

(a) Prec. in Chan. p. 161.

(b) 1 Wash. 246.

(c) 2 Maddock, 64, and the cases there cited.

(d) 1 Vern. 251. 2 Maddock, 64.

(e) 2 P. W. 26, Maxwell vs. Wittenall. 2 Maddock, 67.

(f) 3 Mun. 198.

* Judge Green had been appointed by the executive to fill the vacancy occasioned by the death of judge Roane.

1893.
October.



Jett against Walker.

Where a motion is made to quash an execution and forthcoming bond, on the ground that a previous execution had issued, and a forthcoming bond taken for the same debt, which execution and bond, it was alledged, had been improperly quashed, the court will not enquire into the validity of the first execution and bond, upon the motion to quash the second. The judgment of a competent court, will be considered right, until *regularly* reversed.

Appeal from the superior court of law of Brunswick county. The facts were these : Thornton Jett became the appearance bail of Robert Wallace, in a suit brought by Robert M. Walker, against the said Wallace. Judgment was obtained against the principal and bail ; and an execution issued against the goods and chattels of the said Wallace and Jett. The forthcoming bond recites in the condition, that an execution had issued against Wallace only. This bond being forfeited, notice was given by the plaintiff, that he would move for judgment ; but the plaintiff himself moved the court to quash the bond ; which was accordingly done.

This bond being thus quashed, Walker issued a new execution against the goods and chattels of Jett, appearance bail as aforesaid of Wallace, which was levied on two negroes, and a forthcoming bond taken. Jett gave notice to Walker, that he should move the court to quash the last mentioned execution and forthcoming bond, the said execution having issued illegally. Upon hearing this motion, the court over-ruled it ; and Jett filed a bill of exceptions, setting forth the foregoing facts, and appealed to this court.

Wickham for the appellant, relied on the case of *Beale vs. Wilson*, (a) as an express authority, to shew that the order quashing the first forthcoming bond was erroneous ; and if so, the second execution must have been improperly issued.

(a) 4 Munf. 580.

1889.
October.
Jett
vs.
Walker.

Leigh, contra, contended that as Jett was no party to the judgment on the first forthcoming bond, he could not appeal from that judgment. It was *res inter alios acta*. But, if he could appeal from that judgment, he has not done so in the present case. The judgment appealed from, is the judgment on the *second* forthcoming bond; and the proceedings on the *first*, are only brought to the view of the court *incidentally*, by a bill of exceptions in a different suit. The judgments of *competent* courts, are not to be reversed in this indirect mode. But, even if these principles are erroneous, the judgment of the superior court quashing the first bond, was perfectly correct. The execution was issued against the goods of Wallace and Jett, but the execution mentioned in the condition of the bond, is one against the estate of *Wallace only*. This variance clearly vitiated the bond, and left the appellee at liberty to take out a new execution.

Wickham replied.

Judge BROOKE, delivered the opinion of the court.*

The supersedeas in this case, upon an inspection of the record, is found to extend only to the judgment overruling the appellant's motion, to quash the second execution and forthcoming bond. The court, therefore, not deciding whether the appellant, even if there was error in the first judgment, would be entitled to a supersedeas, is of opinion that there is no error in the second judgment, and it is therefore affirmed.

*Judge Cabell was absent.

NOTE.—After the decision in this case, *Wickham* intimated that he should apply for a supersedeas, to the judgment quashing the first forthcoming bond; but Judge Brooke informed him, that the judges had taken that subject into consideration, and had determined, if such a motion should be made, to refuse it; on the ground of the variance, between the execution and the forthcoming bond.

Briscoe and others against Clarke.

1832.
November.



A deed may be fraudulent, if executed with a fraudulent intent, although founded upon a valuable consideration.

Quere, if a deed be re-acknowledged after its execution, and the record of probate merely states in general terms, that it was proved by the oaths of the *subscribing* witnesses, the witnesses to the *acknowledgment* can be received to prove that it was admitted to probate on *their* evidence, and not on the evidence of the witnesses to the *original* execution.

This was an action of detinue, brought in the superior court of law for Pittsylvania county, by Notley W. Briscoe, George Briscoe, and William Ware, against William Clarke, for two slaves, named Stephen and Milly. Issue was joined on the plea of *non detinet*; and at the trial, the defendant filed two bills of exception. The first states, that the plaintiffs offered in evidence a deed from David Rice, and Charity, his wife, to the plaintiffs, as trustees, for the purposes therein mentioned, dated the 27th day of February, 1813; by which deed, the slaves mentioned in the declaration, are, among other things, conveyed. This deed was re-acknowledged on the 21st of November, 1813, in the presence of three subscribing witnesses. The bill of exceptions further states, that the plaintiffs also offered in evidence, a certificate of its admission to record, stating, that, on the 20th day of December, 1813, the deed above-mentioned, was proved "by the oath of one witness there-
"to subscribed;" that, on the 21st day of February, 1814, it was proved "by the oath of one other witness thereto
"subscribed;" and, that on the 16th day of May, 1814, it was further proved, "by the oath of one other witness
"subscribed thereto." The plaintiffs further introduced the witnesses to the re-acknowledgment, to prove that the deed was admitted to record on the oaths of the witnesses to the re-acknowledgment. To the introduction of this evidence, the defendant objected, upon the ground, that it appears, from the certificate aforesaid, that it was admit-

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ted to record upon the oaths of the witnesses thereto subscribed, without stating that the *re-acknowledgment* was proved, or that it was admitted to record upon the oaths of the witnesses whose names were subscribed to the said *re-acknowledgment*. Whereupon the court decided, that the said witnesses ought to be admitted to prove that the deed was recorded upon their testimony, and not upon that of the other witnesses, whose names are subscribed to the said deed.

The second bill of exceptions filed by the defendant, states, that he moved the court to instruct the jury that the trust deed before-mentioned, was void, as to creditors and subsequent purchasers; it not having been recorded within eight months from the date of the deed, although recorded within eight months from the time of the *re-acknowledgment*. But, this motion was overruled, and the instruction was not given; and the jury were instructed that the recording within eight months from the *re-acknowledgment*, was a sufficient recording, within the meaning of the act of assembly.

The jury rendered a verdict for the defendant; which, upon motion of the plaintiff, was set aside, and a new trial awarded. To this opinion, the defendant filed a bill of exceptions, setting forth all the evidence in the cause, which was, in substance, as follows: on the part of the plaintiff, 1. The indenture before-mentioned. It was dated on the 27th day of February, 1813, re-acknowledged on the 21st day of November, 1813, and recorded on the 16th day of May, 1814. It conveyed the entire property of the grantor, even down to his *geese*. It reserved a life estate to the grantor and his wife, and the creditors were postponed until their deaths. 2. It was admitted, that David Rice, the grantor, had been the administrator of the estate of John Briscoe, deceased, and guardian of his children, and one George Adams had become his surety; who, being dissatisfied, moved the court for counter-security; in consequence of which, William Ware became his

surety. 3. The administration accounts of the said David Rice, shewing a considerable balance due to the estate of his intestate. 4. It was admitted, that the defendant was in possession of the slaves in the declaration mentioned, being two of the slaves conveyed by the deed of trust, and which he purchased under an execution which issued in favor of Henry Perkins. 5. The execution of the said Perkins, dated the 22d day of November, 1813, and levied on the 5th of December, of the same year. 6. It was admitted, that George Briscoe and Notley W. Briscoe are two of the heirs and distributees of John Briscoe, deceased, and two of the wards of the said David Rice; and that the sale of the slaves, under the execution aforesaid, was forbid. On the part of the defendant, 1. A writ of *capias ad respondendum* sued out by Henry Perkins, dated the 22d day of December, 1812, and a copy of the judgment thereupon, dated the 19th day of November, 1813. 2. It was admitted, that the said deed of trust comprehended all the personal property of which the said David Rice was possessed.

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On the second trial, the same evidence was offered by the plaintiffs, to prove that the deed aforesaid was recorded on the testimony of the witnesses to the *re-acknowledgment*, and not on that of the witnesses to the *original execution*. (See the 1st bill of exceptions.) But the court decided, that the evidence was inadmissible, because it would contradict the record. To this opinion of the court, the plaintiffs excepted.

The defendant moved the court to instruct the jury, that this action could not be maintained during the life of Mrs. Rice, the wife of David Rice, the grantor; which instruction was accordingly given, and the plaintiffs excepted to the opinion of the court.

The jury rendered a verdict for the defendant, and the plaintiffs appealed to this court.

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W. Hay, jr. for the appellants, relied upon the following points: I. That the court below properly awarded a new trial. The evidence to impeach the deed, was wholly documentary; and whether it was fraudulent or not, was a question of law, which the court correctly decided in favor of the appellants.

It was executed upon a valuable consideration, and before any lien had attached in favor of any creditor.

A deed may be fraudulent, notwithstanding it is supported by such a consideration; but, where there is no positive proof of a fraudulent intention, and it is to be inferred from *circumstances* alone, the evidence to impeach it, must be very strong. In *Estwick vs. Cailland*,^(a) it was determined, that a conveyance of chattels, by which an interest was reserved to the bargainor, was not fraudulent, which was a much stronger case than the present.

II. Upon the new trial, the court erred in both instructions to the jury.

1. The evidence of the witnesses to the re-acknowledgment, ought to have been received, to shew that the deed was recorded upon their testimony. It has been repeatedly decided, (and very recently, in the case of *Beverley vs. Ellis & Allan*,)^(b) that the admission of a deed to record, is a mere ministerial act, and that where the person offering it complies with the law, he shall not be prejudiced by any misprision of the clerk. The evidence also, in this case, was perfectly consistent with the certificate of the clerk, which does not state by which set of witnesses the deed was proved; and an averment, which stands with the record, may be received.^(c) And, if the evidence had even contradicted the certificate, it was admissible upon the authority of *Jackson vs. Ingraham*,^(d) which was a similar case.

2. The legal interest in the property was, by the deed, vested in the appellants, notwithstanding that a right to

(a) 5 T. R. 420.

(b) Ante, p. 102.

(c) Trials per pais. 582.

(d) 4 Johnson's Rep. 161.

the profits was reserved to the grantor and his wife, during their lives. The deed certainly gives them *some* interest; and it can only be the *legal* interest, because the *beneficial* interest is in the *cestui que trusts*. The doctrine of uses executed, is not applicable to conveyances of chattels(*e*)

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Wickham, for the appellee, contended, 1. That the court erred in granting a new trial. The question was, whether the deed was fraudulent or not. The statute of frauds, avoids all gifts or grants, fraudulently made, with intent to delay, hinder or defraud creditors.(*f*) This fraudulent intent, is a matter of fact, to be found by the jury, in cases at common law, and not to be inferred by the court. The only exception to this rule is, that of cases fraudulent *per se*, as that of the vendor's retaining possession of the property sold. The jury, upon the first trial of the issue in this case, necessarily found the conveyance to have been made with fraudulent intent, to delay, &c. the creditors of the grantor, by finding a general verdict for the defendant; and, unless such finding was clearly against evidence, it was not competent to the court to set it aside. In this case, there was abundant evidence of the fraudulent intent; or, at least, the finding of the jury to that effect, cannot be said to be manifestly wrong. The features of fraud are too palpable to be mistaken. The deed was made very shortly after the institution of the suit in which the execution issued, under which the slaves in question were sold to the defendant. It was not recorded before the judgment was rendered. It was re-acknowledged two days after the judgment was rendered. It conveyed the entire property of the grantor, even to his *geese*; an article of property which no creditor, merely seeking to secure a debt, would have taken a lien upon, to take effect after the lives of two persons. It reserved

(*e*) *Haslinton vs. Gill*, 3 T. R. 620, n. *Scott, &c. vs. Lorraine*, 6 M. 117;

(*f*) *Rev. Code*, p. 15.

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a life estate in the whole property, to the grantor and his wife; and the creditors provided for in the deed, and the surety to be indemnified, were in no event to have the benefit of the deed during the lives of the tenants for life; a provision wholly unnecessary, and indeed, repugnant to the professed object of securing their creditors and indemnifying the surety. This clause could have been inserted for no other object, than to hinder and delay their other creditors. All these circumstances, connected as they are in the same transaction, are striking badges of fraud. A deed made upon a valuable consideration, but with an intent to defraud creditors, is void as to such creditors. The consequence is, that the judgment on the last verdict being such as ought to have been given on the first, is right, and ought to be affirmed.

2. The trustees had no estate, legal or equitable, in the property conveyed, and therefore were not competent to maintain an action. By the deed, Rice and his wife were to have the full and free use of the property, during their lives; and the trustees had no control over it during that period. Their powers were entirely *dormant* until the expiration of the life estate. If the subject had been real estate, it would have been an use executed by the statute. But no statute was necessary, to execute an use of *personal* estate, as the doctrine of uses never did apply to that species of property. The complete separation of the *legal* estate from the *equitable*, in which the former is a mere *ideal* existence, without power or interest, was an attribute of *real estate* before the statute of uses, but never belonged, at any time, to *personal estate*.

3. The opinion of the court, admitting parol evidence of the re-acknowledgment, was erroneous.

W. Hay, jun. replied.

November 27. Judge BROOKE delivered the opinion of the court.

The court is of opinion, that on the matter stated in the third bill of exceptions, the superior court erred in setting aside the verdict, and granting a new trial. Without noticing any other objection, the court affirms the judgment.

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SPECIAL COURT OF APPEALS.

Present—Judges CABELL, COALTER, WHITE, BROCKENBROUGH, SMITH, ALLEN, and RICHARD E. PARKER.

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Harvey, surviving partner, &c. *against* Alexander, &c.

Where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar," parol proof may be admitted of *other valuable considerations*.

A mere naked trustee is a competent witness in a controversy in which a creditor seeks to set aside the deed, on the ground of fraud.

A wife parting with her dower right in real property, forms a sufficient consideration for a subsequent deed conveying *other* property for her benefit.

Although *personal* property, acquired by marriage, cannot be considered a *valuable* consideration, to support a subsequent deed for the benefit of the wife; yet it is a *meritorious* consideration, and the deed will be supported or set aside, according to circumstances.

A deed not lodged to be recorded until eight months after its date, and not proved by the witnesses on whose testimony it was recorded, to have been sealed and delivered within eight months before it was recorded, is *not good as a recorded deed*.

This was an appeal from the chancery court of Fredericksburg.

Samuel Harvey, surviving partner of Harvey and Armistead, filed his bill against William Thornton Alexan-

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der, and Lucy his wife, John Taliaferro, John S. Taliaferro, son of the said John, and James G. Taliaferro. The bill states that on the 3d of April, 1810, the plaintiff recovered, in Spottsylvania county court, a judgment against the defendant Alexander for \$ 800, with interest from the 25th of April, 1802: that an execution was taken out, but not put into the hands of any sheriff, because the said Alexander had, before that time, taken the oath of an insolvent debtor; and the said judgment still remains unsatisfied, except \$ 63 75 cents, which had been paid: that Alexander took the oath of insolvency, before the judgment was rendered, but long after the money had become due: that the insolvency of the said Alexander was pretended and fraudulent; he having, before that time, *voluntarily* and *fraudulently* conveyed a considerable portion of his property: that the deed (hereafter mentioned,) to John Taliaferro, is *voluntary* and *fraudulent* as to creditors, so far as it conveys the reversion of the property to John S. Taliaferro, the son of the said John Taliaferro: that the deed from the said Alexander to John Taliaferro, in trust for his wife Lucy Alexander, is also voluntary, fraudulent, and void as to the creditors of the said Alexander: that the deed from the said Alexander, and Lucy his wife, to James G. Taliaferro, being made without consideration, after the said Alexander had taken the oath of insolvency, with full notice to the said James G. Taliaferro, is also fraudulent and void: that if the deeds are not voluntary and fraudulent as to creditors, yet, the deed from Alexander to Taliaferro, in trust for his wife Lucy, is void as to the creditors of the said Alexander, as the same has not been recorded in the manner prescribed by law, and the plaintiff had no notice of the existence of the said deed: The complainant therefore prays, that the said deeds, or one or more of them, may be set aside, and the property therein conveyed, be subjected to pay the claim of the complainant, with interest; and concludes with a prayer for general relief.

Lucy Alexander answered, that at the time of her intermarriage with the defendant Alexander, she was entitled, in her own right, to a very valuable tract of land in the county of Essex, containing about 950 acres, and to another in the county of Westmoreland, containing 600 acres; that she was also entitled to sixty or eighty slaves, and to a valuable stock of all descriptions, &c.; that some time after her marriage with the said Alexander, he proposed to sell, and did sell the lands aforesaid; that before the respondent would consent to join in the conveyance of her said lands, the said Alexander engaged to settle on her, lands of equal value, and to place them in the same situation as to title; that to carry this engagement, in part, into effect, the said Alexander did, on the 10th day of October, 1802, execute the deed mentioned in the bill of that date; that by this deed, the property therein specified, was conveyed to the respondent, and at her request and desire, the reversion, after the death of the said Alexander, of the tract of land called *Hayes*, was conveyed by the said deed to John S. Taliaferro, the nephew of the respondent, and son of the defendant, John Taliaferro; who, thereupon, as an additional consideration to the said Alexander for the conveyance made to John S. Taliaferro, did execute a deed to the said Alexander, for the tract of land called *Oakland*, and paid other considerations to the said Alexander; that the deed bearing date the 16th day of December, 1804, was executed upon the following considerations: 1. To satisfy a considerable excess in the value of the lands and other property belonging to the respondent in her own right, beyond the lands, &c. conveyed to her by the deed of the 10th of October, 1802. 2. An agreement, on the part of the respondent, to relinquish her right of dower in a very valuable real estate held by the said Alexander, in the town of Alexandria. 3. A release, on the part of the respondent, of all her claim on the said Alexander, for her future support and maintenance; that these various considerations, independently of

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December. the consideration paid by the said John Taliaferro, on account of the reversion of the Hayes land, were more than Harvey, &c. an equivalent to the said Alexander, for all the property conveyed by him to the respondent and the said John S. Taliaferro, by the two deeds mentioned in the bill; that, as it was notorious that the said Alexander was wealthy, independently of the property conveyed by the said two deeds, nothing can be more erroneous than the suggestion, that the said two deeds were executed *voluntarily* and *fraudulently* by the said Alexander; that the respondent has regularly received, up to the present day, from the said John Taliaferro, the annuity conveyed to her by the deed of the 16th of December, 1804: that she sold and conveyed to James G. Taliaferro 300*l*. of the said annuity and the other property conveyed to her by the two deeds aforesaid, and delivered the same into his possession, long before the institution of this suit: that Alexander and John Taliaferro joined the respondent in the conveyance of her right to the said property; and accordingly a deed was executed by them to the said James G. Taliaferro: that as to the suggestion that the deed of December, 1804, has not been recorded according to law, the respondent has been informed that the said deed was duly recorded within eight months from the *execution* and *delivery* thereof: that she has also been informed, that the said deed has, in a second instance, been recorded in a manner to render it valid: that even if the said deed has not been recorded *precisely* at the period required by law, such omission cannot destroy her claim to the property thereby conveyed to her, as she is a creditor entitled to the highest consideration of a court of equity.

The answer of John Taliaferro, confirms all the material statements in the answer of Lucy Alexander; particularly as to the value of her separate estate, which she had consented to sell, in consequence of an agreement with the said Alexander, that he would, when thereto required, settle other lands on her, of at least equal value to those which

she had parted with: that at the date of the deed of 1802, the said Alexander was wealthy, and not indebted beyond the current accounts usual to men of his large income: that the said Alexander, wishing to free himself from the perplexing attentions incident to the management of his estate, to which he found himself unequal, proposed to the respondent that he should take a lease of all the lands in the county of King George, together with a portion of the slaves, stocks, &c., at the price of 500*l.* *per annum*, for the life of the said Alexander: that Lucy Alexander, seeing that she had no reasonable prospect of children, determined to convey to her nephew, John S. Taliaferro, the son of the respondent, all the interest intended for her, in the tract of land called *Hayes*: that in consideration of this provision for the respondent's son, he determined to accept the lease of all the said Alexander's lands in King George, including the *Hayes* land, and to give 600*l.* instead of 500*l.* *per annum*; which latter sum the said Alexander had at first proposed to lease the said lands for: that in addition to this, the respondent conveyed his mansion tract containing at least 300 acres with a comfortable dwelling house &c. to the said Alexander for his own life and the life of the said Lucy, and in remainder to such issue as the said Lucy might by possibility leave; which conveyance is dated the 10th day of October, 1802; that the respondent also paid \$5000 to the said Alexander, by granting to him an acquittance in writing of a debt due from the said Alexander to the respondent: that since the 1st day of January, 1803, he has paid the said 600*l.* *per annum* with punctuality: that the said *Spring Hill* tract of land, leased by the said Alexander to this respondent, never did vest in the said Alexander in fee simple, but was, in pursuance of the bond of the 14th day of August, 1800, conveyed by James G. Taliaferro and wife to this respondent, in trust for the said Lucy; as will appear, by their deed of the 9th of April, 1803. Upon the whole, the real property conveyed to the said Lucy by the several deeds spoken of above, was not

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 December. equal in quantity or value, to her lands which had been
 Harvey, & Co. sold by her husband ; and the personal property secured
 vs. to her by the deed of the 10th of October, 1802, was not
 Alexander, beyond a third part in value of the personal property,
 & Co. which she had held in her own right : that the deed of
 the 16th day of December, 1804, was *executed* and *delivered*
 by the said Alexander to the respondent, *not on the*
day of its date, but on some day in the very last of April
 or early in May, 1805 : that the said deed was prepared
 and *dated* at one time, and *executed* and *delivered* at another :
 that it was made on the following considerations ;
 1. To make satisfaction for the residue of the real and
 personal estate of the said Lucy, sold by the said Alexander,
 and not provided for by former arrangements ;
 2. An agreement by the said Lucy to relinquish her right
 of dower in a very valuable real estate then held by the
 said Alexander in and near the town of Alexandria ;
 3. An agreement on the part of the said Lucy to release
 the said Alexander from all claims on him for her future
 maintenance : that all these considerations have been
 faithfully complied with on the part of the said Lucy,
 and they would have been fully recited in the said deed,
 but the respondent who wrote the deed, did not consider
 such a course necessary to its legal validity ; that the
 said Alexander, at that time, was worth 60 or 80,000 dollars,
 clear of all debts : that the arrangement was a beneficial
 one to the *creditors themselves*, whether present or future ;
 for, by the consent of the said Lucy to relinquish her right
 of dower, it enabled her husband to convert into money,
 60 or 80,000 dollars worth of real property, which he
 otherwise could not have sold on any terms : that the deed
 dated on the 16th day of December, 1804, was not executed
 on that day, and was recorded within eight months from
 the time of the execution and delivery thereof by the said
 Alexander to the respondent.

The answer of John S. Taliaferro, refers to that of John Taliaferro, for information on the several points in issue between the parties.

James G. Taliaferro, says in his answer, that he became the purchaser of the property mentioned in the bill, for a fair and valuable consideration, and the deed was executed to him by Alexander and wife, and John Taliaferro; that the said Alexander and Taliaferro, were mere nominal parties; without interest in the premises; that the said deed was executed in pursuance of an agreement which had for some time been made with him by the said Lucy, whereby she had, for several valuable considerations, paid to her by the respondent, engaged to convey to him all her right to the whole of the real and personal estate, which had been conveyed by the said Alexander, to the said John Taliaferro, for the benefit of the said Lucy; that the principal considerations for the said deed, were, 1st. about eight thousand dollars paid to the said Lucy, through the said John Taliaferro; and 2dly. an agreement by the respondent to maintain the said Lucy, at his own expense, during the life of the said Alexander; that the said Alexander parted with no interest in the premises by the said deed, nor does the respondent claim any thing from him in virtue of the said conveyance; that the respondent knowing that the two deeds of trust mentioned in the bill, were both executed *bona fide*, and upon full and fair consideration, the respondent had no hesitation in paying to the said Lucy, the considerations mentioned above, besides other considerations which he has paid to her: that he had no notice of the plaintiff's claim, at the time he bought the said property, which has been now at least ten years in his possession; and therefore he conceives that his title cannot be shaken by the claim of the plaintiff, or of any other person.

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The following documents were made exhibits in the cause:

1. A deed from Alexander, to John Taliaferro, dated the 10th day of October, 1802, for the benefit of Lucy his wife, by which the said Alexander conveys to the said Taliaferro, in trust for his wife Lucy, sundry tracts and

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parcels of land, together with sundry slaves, upon condition that the said Taliaferro shall pay to the said Alexander, \$ 2,000 *per annum*, during his life, and after his death, the said Taliaferro shall convey the tract of land called *Hayes*, to John S. Taliaferro in fee simple, and all the remainder of the property to Lucy Alexander; and in case the said Lucy shall die before her husband, then the said Taliaferro shall convey the same to such persons, as would have been entitled thereto, if the said Lucy had never been married. This deed was made "for and in consideration of the natural love and affection which he bears to his wife Lucy Alexander, and to his nephew John Seymour Taliaferro, son of said John Taliaferro junr. and the further consideration of one dollar to him in hand, paid by the said John Taliaferro, junr."

2. A deed between the same parties, dated the 16th day of December, 1804, by which Alexander conveys to Taliaferro the 600*l.* payable to him the said Alexander by the said Taliaferro, for the annual rent of his estate, granted by the deed last mentioned, together with the land which was Hansford's, and certain slaves and other personal estate, in trust that the said Taliaferro shall annually pay over to Lucy Alexander during her life, the said 600*l.* and the annual profits of the other estate conveyed to him, to her only use; and in case the said Alexander should survive his wife, then the same to be paid to him during his life; and finally the said property shall be conveyed, after the death of the said Alexander and wife, to such persons as she may by her last will direct, and in default thereof, to such persons as would have been entitled thereto, had she never intermarried with the said Alexander. This deed is made for and in consideration of "the love and affection which he bears to his wife Lucy Alexander, and for the further consideration of five pounds to him in hand paid, &c."

3. A deed from John Taliaferro, junr. and Lucy his wife, to the said Alexander, dated the 10th day of October,

1802, whereby he conveys "for divers considerations, and
 "for one dollar to him, the said John, in hand paid," all
 that tract of land, which the said John had from Alexan-
 der Hansford, amounting to 300 acres or thereabouts, for
 the term of the natural life of the said Alexander, and the
 life of his wife, remainder in fee, to the children of the
 said Lucy Alexander, if she should leave any.

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4. A deed dated the 9th day of April, 1803, between
 James Taliaferro and wife, John Taliaferro, junr. and
 Alexander and Lucy his wife. This deed recites that
 Alexander having purchased of James Taliaferro, a tract
 of land called the *Spring Hill* tract; and having sold
 another tract of land called *Fox Hall*, the property of
 Lucy Alexander, in which conveyance the said Lucy had
 joined, in consideration that the said Alexander would
 convey to the said Lucy, the said *Spring Hill* tract, as a
 compensation for the said *Fox Hall* tract, in which she had
 relinquished her title: In consideration of the premises,
 James G. Taliaferro and wife, convey the greater part of
 the *Spring Hill* tract, to John Taliaferro, junr. in trust
 for the said Alexander, to receive the profits during the
 joint lives of himself and his wife, and if he should sur-
 vive her, having had a child born alive, then he is to en-
 joy the profits of the said estate, during his natural life;
 and afterwards the said John Taliaferro shall convey the
 said estate, to the heirs and assigns of the said Lucy, in
 fee simple.

5. Sundry conveyances from Alexander to various per-
 sons, to which his wife Lucy had relinquished her right
 of dower.

Depositions were taken to establish the allegations in
 the answers of the defendants; and particularly the de-
 position of John Taliaferro, junr. the defendant in this
 cause, taken by virtue of a special commission. This de-
 position contains a more full detail of all the circumstan-
 ces stated in the answer of the said John Taliaferro. In
 this deposition, he states that the said Alexander, after

1892. parting with the property conveyed by the deed of 1904,
December. was worth \$ 60,000 or \$ 80,000. To this deposition, the
Harvey, &c. plaintiff excepted on the ground of interest in the witness,
vs. The chancellor dismissed the bill of the complainant,
Alexander, upon a hearing; from which decree, the plaintiff appealed
&c. to this court.

Stangard, for the appellant, contended, that the two deeds of trust to John Taliaferro, were void against creditors on two grounds; 1st. In point of law, and 2dly. Because they are proved, in point of fact, to have been entirely *voluntary*.

1. The deeds are void against creditors, on legal principles, because the consideration expressed in both of them, is nothing more than the "love and affection which the said Alexander bears to his wife Lucy;" a consideration, which cannot be sustained against a *bona fide* creditor. This objection can only be evaded, by proving some *valuable* consideration, not expressed on the face of the deeds. But such proof cannot *legally* be admitted. It may be laid down as a correct rule, that a deed purporting on its face, to be made for natural *love and affection*, cannot be averred and proved to be for a *valuable consideration*. In *Clarkson vs. Hanway*, (a) and in *Peacock vs. Monk*, (b) it is expressly decided that a different consideration from that expressed in the deed, cannot be averred. The same principle was decided in *Maigley vs. Hauser*. (c) The only cases in which a consideration can be averred, that is not expressed on the face of the deed, are those in which either no consideration is expressed; or general words are used, such as "*and for other considerations*;" or where the new consideration is congruous with the consideration expressed by the deed. The cases already cited, support the two first exceptions; and the last is exemplified in the case of *Eppes vs. Randolph* (d), where parol evidence was

(a) 2 P. Will. 903.
(b) 1 Ves. senr. 122.

(c) 7 Johnson's Rep. 341.
(d) 2 Call. 126.

received under the terms "*for the better advancement in life of D. R.*" This consideration was deemed congruous with the evidence, that the deed was made in consideration of marriage, and therefore such evidence was admitted. But no such general terms are contained in the present deeds, and therefore no new consideration can be averred.

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The next objection is, that the deed of 1804 was not recorded according to law, as more than eight months had elapsed between the day of its delivery, and its being admitted to record. The only mode in which this conclusion can be evaded, is to contend that the deed was *in fact delivered* on a *subsequent day*, to that which it bears on its face; and for this purpose, *parol* evidence must be resorted to. It cannot be denied that a deed may be *dated* on one day, and *delivered* on another. But, this fact can only be made to appear by the *record* itself. When no particular day of *delivery* is mentioned in the deed, or in the entry of its being admitted to record, the *date* of the deed must be taken to be that of its *delivery*; and no averment can be admitted, that it was delivered on a *different* day. Otherwise, the date of the deed, would be entirely nugatory, or calculated to mislead. To admit *parol* evidence to prove a *different* day of *delivery*, would be to contradict a record. The policy of the law, was, to give notice on record, to the whole world of the existence of a conveyance, and of its *due execution*, in respect to all the steps necessary to be taken, to render it valid against creditors and subsequent purchasers. But, if a purchaser or creditor should be driven to make inquiries in *pays*, as to the validity of a deed, the main object of the law would be defeated. The evidence so adduced, must necessarily be weaker, than that afforded by the record. But, if such evidence can be received, it can only proceed from the *attesting witnesses*. All other evidence must necessarily be inferior in force and effect, to that of the subscribing witnesses.

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2. But, if *parol* evidence may be admitted, still the evidence adduced in this case is both *incompetent* and *unworthy of credit*. The only witness who proves that the deed was delivered on a different day from that on which it is dated, is John Taliaferro. But he is clearly interested. He was bound to pay a rent of 600*L. per annum* to Alexander and his wife. As soon as he had notice that the deed was charged with fraud (and he had notice from the filing of the bill,) all payments made by him were made in his own wrong, and he would be liable to a decree to that amount, in this suit. He is therefore deeply interested in sustaining the deed.

[The remarks of the counsel to prove that the evidence is unworthy of credit, being a mere comment upon testimony, involving no question of law, are omitted as not coming within the scope of this report.]

Wickham, for the appellee.

1. As to the question whether *parol* evidence can be admitted, to prove a consideration not expressed on the face of the deed? Whatever may be the rule in a court of law, a court of chancery will inquire into the *real* consideration. This is proved by the case of *Quarles and Lacy*(*e*); and *Sugden*(*f*) supports the position. The cases cited by Mr. Stanard do not sustain his doctrine. *Eppes vs. Randolph*(*g*) is in my favor, because the terms "*advancement in life*" apply only to a *gift* to a child and not to a *marriage portion*. The proof, therefore, of a marriage portion was not comprehended in the consideration expressed; and yet the court admitted such evidence. Moreover, the court lay no stress upon that circumstance, but say in general terms, as to David Randolph, that "*being at liberty to aver and prove the real consideration*," he has satisfactorily proved the deeds to have been in "*consequence of a marriage between, &c*" He is to be con-

(*e*) 4 Mun. 251.

(*f*) p. 438.

(*g*) 2 Call, 125.

"sidered as a purchaser for a valuable consideration." 1822.
 Stronger words could not be used to shew that, in equity, December.
 a party may aver and prove the *real* consideration. The Harvey, &c.
 case in 7 Johnson(*h*) was a case at law; but even there vs.
 the court intimate an opinion, that a court of equity would Alexander,
 afford redress. The bill in this case charges a gross &c.
actual fraud. This puts the *real* consideration directly in
 issue. The bill does not charge a fraud upon Lucy Alex-
 ander and John Taliaferro. While this precludes the
 appellant from proving fraud as to them, it opens the ques-
 tion of consideration as to the remaining parties.

2. The deed of 1804 is not void, because it was not re-
 corded within eight months from its *date*; but *parol* evi-
 dence may be admitted to prove its *execution* on a differ-
 ent day. The difference between our act of assembly
 and the statute of Henry 8th, on the subject of recording
 deeds, is remarkable. The latter speaks of enrolment
 from the *date*; the former speaks of recording within
 eight months from the time of "*sealing and delivering.*"
 This difference in the two statutes, plainly indicates the
 will of the legislature, that the *date* of a deed should not
 be regarded as conclusive evidence of the time of its *exe-*
cution. Even in England, Lord Coke(*i*) tells us, that
 where there is no date, the deed shall have effect from its
 execution. The act does not require that, for the *pur-*
pose of recording, the time of delivery should *appear upon*
record, but only says that the deed must be admitted to
 record, within eight months from the time of its *execu-*
tion; leaving the parties at liberty to prove a delivery by
parol evidence. Some of the objects of this deed do not
 require recording at all. So far as it releases the rent to
 John Taliaferro, it does not come within the provisions of
 the act. A *debt in money* may be released without the
 solemnity of recording. If, for example, a deed contains
 among other things, the release of a bond, the release
 will be effectual, although the deed should never be re-
 corded. If the release had been on a separate piece of

(h) p. 341.

(i) 2 Inst. 674.

1822. paper, it would have discharged the *release*. The statute
 December. relates only to legal rights which subsist after the deed ;
 Harvey, Jn. not to debts which are *extinguished* by the release.

vs. Taliaferro is not an incompetent witness. He could
 Alexander, Jn. never be rendered liable to the appellants for the rents
 which accrued after the filing of the bill, and which he
 had duly paid under his contract. A bill merely *suggest-*
ing fraud could not be a sufficient notice to him, to jus-
 tify his withholding the rents from the person entitled to
 them, by a solemn deed. It was not his duty to decide
 on the conflicting evidence and to weigh the points of
 law, on which the question of fraud depended. If the
 appellant had wished to prevent John Taliaferro from
 paying over the rents, he might have applied to the
 chancellor for an injunction to restrain him. In that
 case there would at least be a judicial decision, that the
 allegation of fraud was supported by *prima facie* evidence;
 and he would be saved from the embarrassing necessity
 of deciding for himself, on a complicated question of law
 and fact. The charge of fraud might be unfounded and
 frivolous. Would it be said that, in such a case, Talia-
 ferro could justly keep back the rents from those who
 were entitled to them by deed? And, if his duty in this
 respect is to depend upon the *strength* or *weakness* of the
 evidence, is it just to make him the judge, at his own
 risque, of questions only suited to a judicial tribunal?
 On the other hand, how easy would it have been for the
 plaintiff to have added to his bill, a prayer for an injunc-
 tion? As he has not done this, he has no right to claim a
 benefit from his omission.

Stanard, replied.

December 6th.—Judge CABELL delivered the opinion
 of the court.

The appellant, a judgment creditor of William T.
 Alexander, for a debt contracted in April, 1802, prefer-

red his bill, seeking to set aside, as *voluntary* and *fraudulent*, two deeds executed by the said William T. Alexander; one of them bearing date the 10th day of October, 1802, the other bearing date the 16th of December, 1804. He farther contends that if the deeds be not *fraudulent*, the last of them is *void* as to creditors, not having been recorded within the time required by law. The appellees deny the fraud, and aver that both deeds were executed for valuable and meritorious consideration: And as to the deed of 1804, they aver that although it was not recorded within eight months from its date, it was recorded within eight months from the sealing and delivery thereof. The chancellor dismissed the bill of the appellant, who appealed to this court.

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The deeds will be separately examined.

First. As to the deed of 10th October, 1802. The considerations expressed in the deed are "natural love and affection," and "one dollar."

The counsel for the appellant, considering this deed as voluntary on the face of it, contended that proof of valuable consideration was inadmissible, as being inconsistent with the deed. But the court is of opinion, that the question whether evidence inconsistent with the deed can be admitted, does not arise in this cause. This is not the case of a deed purporting to be for good consideration only. It is, in express terms, for valuable as well as for good consideration. It is true that the valuable consideration expressed, is only one dollar: But, one dollar, viewed as a consideration, is as much a *valuable* consideration, as a million of dollars. The real question is, whether a deed, purporting to be for "love and affection," and for "one dollar," and assailed as being fraudulent as to creditors, can be supported by evidence shewing that in addition to the one dollar expressed, full value was received by the grantor. This question may be simplified by supposing the deed to have been between the same parties, and for the same purposes; and that the only consi-

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deration expressed in the deed was the sum of one dollar paid by the grantee. It could hardly be doubted, that the evidence would be admissible in that case. Indeed, the principle of the objection made by the counsel for the appellant, that the evidence would be inconsistent with the deed, does not apply to such a case. It is believed to have been the practice, at an early period, both in England and in this country, for deeds not to express the actual sum, but a nominal one only : and yet the court has not seen a single case in which it has been held incompetent to the party claiming under the deed, to aver and prove the sum really given. *The King vs. The Inhabitants of Scammonden,* (j) is an authority in point, shewing that such evidence is admissible. In that case, the consideration expressed was 28*l.* ; whereas the sum really given was 30*l.*, which it became necessary to prove. Lord Kenyon said it was clear that the party might prove other considerations than those expressed in the deed. The case of *Eppes vs. Randolph,* (k) and *Quarles vs. Lacy,* (l) have a strong bearing on this point. In the latter case, there was no consideration expressed as moving from the wife, and only the consideration of one dollar from the trustee. (See the original record.) There can be no reason for not extending the same rule to a deed which, in addition to a valuable, states also a good, consideration. On a view of the authorities, this court is clearly of opinion that such evidence is admissible ; and more especially where, as in the present case, the persons beneficially interested in the conveyance, are a *feme covert*, and an infant, to whom, in consequence of the incapacities under which they labour, greater indulgence is extended for any defects in points of form. And, in estimating the amount of the consideration, we are to take into the estimate every valuable consideration received by the grantor. It is not necessary that they should move from the person claiming under the deed. From whatever source proceeding, they operate as

(j) 5 Term Reports, 474. (k) 2 Call, 125. (l) 4 Mun. 251.

legal considerations for the conveyance, and enure to his benefit. On this principle we are to estimate the considerations moving from John Taliaferro, jun. the trustee. 1822.
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But it is objected, that the said John Taliaferro, a witness relied on by the appellees, for the purpose of establishing the consideration, is incompetent on the score of interest. If this objection be intended to apply to him as a necessary party to the cause, in his character of trustee, it is clearly unsustainable. There can be no question that a naked trustee is a competent witness. It may also be remarked, as a general principle, that courts, at present, receive objections to witnesses with great caution as they relate to their competency; and that they incline to refer them to their credibility. It is alledged, however, that the objections in this case are too strong to be overcome; for, that he has a direct interest in the cause, because of the rent of 600*l.* per annum, which, by the deed aforesaid, he became bound to pay; that the bill gave him notice that the deed was charged with fraud; that all payments made by him, since the bill, were made in his own wrong, and that he is liable to a decree therefor in this suit: That the rent, in case the deed shall be set aside, ought to be subjected to the claims of creditors, the court does not deem necessary to affirm or deny. But, if Taliaferro shall have actually paid the rents, either to Alexander or to his assignees, the court is of opinion, that the said Taliaferro ought not, under the circumstances of this case, to be made liable therefor. The institution of the suit, or the filing the bill impeaching the deed of fraud, but containing no prayer that he should not pay the rent over, was not of itself sufficient to justify him in withholding the rent from those to whom he had contracted to pay it. All the parties interested in the rent were before the court; and if the appellant wished to injoin the rent in the hands of Taliaferro, the court of chancery was always open to him to apply for an order to that effect. For aught that appears to this court, the appellant might have

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preferred that the rent should be in other hands than those of John Taliaferro. His failure to obtain from the chancellor, such an order as has been mentioned, especially when his bill was silent on the subject, left John Taliaferro at liberty to pay the rent to those who, under the deed, were entitled to receive it. And this remark applies with equal force to that portion of the rent to which James G. Taliaferro became entitled, and which he released in consequence of a surrender to him of a portion of the property on which the rent was reserved. It is not charged in this bill, nor established by proof, that there was any fraud practised by Taliaferro in obtaining the lease, nor that the rent was inadequate. The reverse, as to the rent, is positively proved. In fine, the court does not perceive the weight of any of the objections to the competency of this witness.

John Taliaferro, being thus decided to be a competent witness, is he credible? This is a question which the court is not disposed to argue. We doubt not that the counsel for the appellant, in the freedom and severity of his remarks on this topic, was urged by a sense of duty to his client, and actuated by a strong conviction that he was supported by the record. The view, however, which we have taken of the circumstances touching this point, is very different from that which presented itself to the appellant's counsel. We have examined the record patiently and minutely, and we have not seen that John Taliaferro has done any thing that considering the relation in which he stood to the parties, he ought not to have done. We perceive nothing that is calculated to cast a shade on his character; nothing to impeach his conduct as a man, or his credit as a witness.

The court is of opinion, that the testimony in the cause shows that Alexander received valuable consideration, full and adequate, for all the property conveyed by the deed of the 10th of October, 1802; and that that deed, therefore, stands discharged from every imputation of fraud.

Secondly. As to the deed bearing date the 16th December, 1804. The considerations expressed are "natural love and affection," and "five pounds." What has been said, therefore, with respect to the deed of 1802, as to the propriety of admitting proof of farther consideration than that expressed, applies with equal force to the deed of 1804. The considerations proved, are the release of Mrs. Alexander's right to all future support from her husband; the relinquishment of her right of dower in all her husband's real estate; and the excess of the value of the property, which Mrs. Alexander once held, but which was sold by Alexander, over the value of the property previously settled on her; a portion of this property, however, being personal, had, by the marriage become Alexander's, subject to his disposal and liable to his debts; it ought, therefore, to be excluded in estimating the amount of the valuable consideration of the deed of 1804. And even when excluded, the court is by no means certain that the valuable consideration was not full and adequate. Admit, however, that they were not full and adequate, it will not necessarily follow that the deed was *mala fide*, and fraudulent as to creditors: although the personal property brought by Mrs. Alexander to her husband and sold by him, can form no part of the valuable consideration of a deed settling other property on her, yet it may and ought to be taken into view as a meritorious consideration of such deed; and the deed will be supported or set aside according to circumstances. What are the circumstances of this case? It appears that Alexander at the time of his marriage, was possessed of a magnificent estate. His wife brought him another, not much inferior. It appears that he was extravagant and prodigal in the extreme. To supply the demands of this prodigality, a sale of property became necessary. The personal property acquired by his marriage, he had a right to sell; and he did sell much of it. He prevailed on her, moreover, to consent to his selling the whole of her real estate, and she con-

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veyed it accordingly ; stipulating, however, that he should settle other lands upon her of equal value. He promised moreover to make a similar settlement of other property, equal in value to the personal property which he had got by her and which he had sold. These promises were partly performed by the deed of 1802, heretofore examined. In the latter part of the year 1804, he had become so intemperate in his habits, that his wife could no longer live with him ; and she resolved on a final separation from him. This resolution received the concurrence of Alexander himself. In contemplation of this event, Mrs. Alexander agreed, as before stated, to relinquish all claim on him for future support, and to relinquish her claim of dower in his real estate ; in consideration whereof, and of former promises made by him in relation to her personal property sold by him as aforesaid, Alexander agreed to convey, and did convey for her benefit, the property embraced by the deed of 1804 ; which property in addition to that conveyed by the deed of 1802, is proved to be of less value than the property, real and personal, which had been held by Mrs. Alexander in her own right, and which had been sold by her husband. There is no proof in the cause that at that time, or even as late as the last of April, or first of May, 1805, Alexander was much involved in debt. It is not pretended that at that time, he was otherwise than solvent. There is on the contrary positive proof that at that time, viz : in April or May, 1805, he was not materially indebted ; and that exclusive of the property conveyed by the said deed, and exclusive of as much more as would be sufficient to pay all his debts, he was worth a large estate. It is also proved by John S. Welford, that after the first of May, 1805, he made a deed of gift to McFarlane and wife of ground rent in the town of Alexandria, amounting to about 150*l.* for ever. The said John S. Welford, who had long acted as the general agent of Alexander, and who declares himself well acquainted, in consequence of that agency, with his situation, express-

ly proves him to have been solvent as late as the month of February, 1806, when his agency terminated; and moreover declares his belief, that if the claim of the appellant had been presented to him at any time during his agency, (which agency was general and notorious in Fredericksburg and in Alexandria and their vicinities,) satisfactory arrangements would have been made for its discharge. It is proved also, that Mrs. Alexander did not permit Alexander to incur any farther expense for her support, and that she relinquished, whenever required, her claim of dower to his real estate. Under all these circumstances, this court is not satisfied, as at present advised, that the said deed ought to be set aside as fraudulent, even as to a prior creditor of the said Alexander; and even, although a part of the consideration of that deed may not have been valuable, but meritorious only. But on this point the court gives no opinion.

But it is alledged, that the said deed has not been recorded within the time required by law, and that therefore, although not *fraudulent*, it is *void* as to creditors. The deed is an exhibit in the cause. It bears date the 16th December, 1804, and it appears by the certificate of the clerk that it was not proved till the 5th day of September, 1805. It does not appear, that the witnesses proved this deed otherwise than in the usual form; it does not appear, that they proved it otherwise, than as a deed sealed and delivered on the day on which it bears date. Looking no farther than to the certificate of the clerk, we should be bound to say that it was not proved and recorded within the time required by law. But it is averred by the appellees, that the deed, although dated on the 16th day of December, 1804, was not, in fact, sealed and delivered till April or May, 1805; and they have taken depositions to prove the fact. It is contended, however, for the appellant, that whatever may have been the time of the sealing and delivery, yet if the deed bears date more than eight months before the time of proving it, and the

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record does not shew that the witnesses proving the deed, proved that it was sealed and delivered within eight months before the time when it is fully proved and lodged to be recorded, it has no validity as a *recorded deed*, against a creditor. This is a question of great importance, and the court has found it one of some difficulty. Its solution depends on the sound construction of an act of Assembly prescribing a general regulation, *juris positivi*, merely. In such cases, the court has nothing to do with the hardship of the case, nor even with the principles of abstract justice. It is a great hardship, to the individual, that a fair purchaser of lands, for valuable consideration, shall lose the benefit of his purchase, because of unavoidable accidents preventing the attendance of his witnesses to prove his deed within the required time. Yet the case has frequently happened; and should the party complain of hardship, he would receive for answer, *ita lex scripta est*. The object of the legislature was to prescribe a general regulation, and to establish a criterion by which we may know, with greater certainty, who are the real owners of lands and tenements. For that purpose, the act of Assembly under which this deed was recorded, directs, that all conveyances of such property shall be by writing, sealed and delivered; and declares, that such conveyance shall not be good against a subsequent purchaser without notice, nor against any creditor, unless acknowledged or proved according to law, and recorded within eight months from the sealing and delivery thereof. And as to all deeds of trust and mortgages whatsoever, they are declared to be void as to all creditors, and subsequent purchasers, unless they shall be acknowledged or proved, and recorded as aforesaid. A deed, it is admitted, takes effect from its delivery, and not from its date. The policy of the law, therefore, (the giving information as to the situation of the title to lands,) would seem to require, that the time of delivery shall appear on the record. For, how, otherwise, can creditors, or others, know who are the real owners of

land. If a deed has a date, the law intends it to have been delivered *at the date.*(*m*) When, therefore, a deed having a date, is proved by witnesses who say nothing as to the time of delivery, and is thereupon recorded, it stands recorded as a deed proved to have been delivered at its date; and if that date be more than eight months before it is lodged to be recorded, the deed, although spread upon the record, is shewn by the record itself not to have been recorded according to law; and is, therefore, not good as a recorded deed. It has been held in England, that although a stranger is not concluded by an enrolment, but may aver that the deed was delivered at a day different from that which the enrolment purports, yet that the *parties* are concluded, and shall not be permitted to aver that a deed was delivered at a day since the date; for, by the same reason it might be averred that it was never delivered.(*n*) It is not necessary to decide that principle in this cause, and the court accordingly does not decide it. We mean to go no farther than to decide, that a deed not lodged to be recorded until eight months after its date, and not proved by the witnesses, on whose testimony it was recorded, to have been sealed and delivered within eight months before it was recorded, *is not good as a recorded deed.* On this ground we are of opinion, that the deed in the record mentioned, bearing date the 16th Dec. 1804, is void as to the appellant. The decree of the chancellor, is therefore reversed so far as it dismissed the bill as to that deed, and is affirmed as to the residue; and the cause is remanded, &c.

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The court is of opinion, that the deed of the 10th Oct. 1802, was executed, bona fide, for full, adequate and valuable consideration, and stands discharged from every imputation of fraud. The court is farther of opinion,

(*m*) 2 Inst. 674.
(*n*) Comyn's Dig. 2 vol. p. 66, 67, referring to Savell's Re. 21; 1 Leo. 183, 2 Leo. 122, and Ow. 132.

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that the deed of the 16th Dec. 1804, was executed bona fide, for considerations valuable and meritorious, without any intention to defraud creditors ; but the court is of opinion, that the said deed, not having been recorded within the time required by law, is *void* as to the appellant, a creditor of the grantor Wm. T. Alexander. So much of the decree, therefore, as is in conflict with this opinion, is reversed with costs, and the residue thereof is affirmed ; and the cause is remanded for farther proceedings to be had therein, according to the principles now declared.

SPECIAL COURT OF APPEALS.

1822.
December.

Taliaferro against Horde's administrator.

An attachment for contempt in disobedience of a decree of the Chancery Court, will only lie for disobedience of what *is* decreed, and not for what *may be* decreed.

Appeal from the chancery court of Richmond.

The case was this :

Horde was the creditor of W. T. Alexander by bond, and brought a suit at law, and obtained a judgment. An execution was issued against the body of the said Alexander, and he was discharged, upon taking the oath of insolvency. The plaintiff Horde, then filed a bill in chancery against the said Alexander and Lucy his wife, and John Taliaferro, to set aside two deeds executed by the said Alexander, to the said Taliaferro, as trustee for the benefit of the said Lucy, and for other purposes.* These

* These deeds are more fully detailed in the last case.

deeds are impeached as having been made "*voluntarily, and with intent to defraud your orator and his other creditors,*" (meaning the creditors of the said Alexander.) The defendants answered, setting forth the facts which are stated more at large in the last case. The chancellor, *without deciding upon the validity of the deeds in the bill and answer mentioned*, the deed of the 16th of December, 1804, *not having been recorded within the time prescribed by law, is void as to the creditors of the said William T. Alexander*; and therefore decreed, that unless the defendant should pay the plaintiff's demand, within sixty days after having been served with a copy of the decree, with interest, the sheriff or his deputy should sell at public auction, so much of the personal estate conveyed by the deed of 1804, as shall be sufficient to pay the said debt, interest and costs, after advertising, &c. And that the said J. Taliaferro, and Lucy Alexander, or either of them, being in possession of the said estate, do deliver the same or so much thereof, as may be required for that purpose, to the said sheriff or either of his deputies, &c.

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From this decree, the defendants appealed; and the court of appeals affirmed the decree.

A bill of review was presented by John Taliaferro and Richard Foote and Lucy his wife, (formerly Lucy Alexander;) but the chancellor, deeming the matter stated in the bill to be insufficient, rejected the motion.*

Copies of the above mentioned decree, were served on John Taliaferro, Richard Foote and Lucy his wife, (formerly Lucy Alexander.)

John Taliaferro replied, that he had no funds in his hands, belonging to the defendant, (meaning the said Alexander.)

Lucy Foote replied, that the negroes now in her possession, had been settled on her, at the time of separating from her former husband; and that consequently she would not give them up, to pay his debts.

* From this decree an appeal was taken, and the court of appeals affirmed it.

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Copies of the said decree were a second time served on John Taliaferro and Richard Foote, and Lucy his wife, with a demand that they would surrender so much of the property referred to in the said decree, as would be sufficient to satisfy the plaintiff's demand. But, Taliaferro refused to comply, alleging that no part of the property spoken of in the decree, is, or ever was in his possession; nor has he any control over it, such as to enable him to deliver up any part of it in satisfaction of said decree. Richard Foote and his wife, refused to surrender any of the property.

Horde being dead, his administrator gave notice to Taliaferro and Foote and his wife, that he should move the court of chancery to award an attachment against them for failing to comply with the decrees and order of the court, by not delivering the property mentioned in the said decree.

Taliaferro filed an affidavit, in which he stated, that no part of the property conveyed to him in trust, by Alexander, by the deed of 1804, was in his possession at the time the marshal demanded of him as much as would satisfy the decree above mentioned; and further, that no part of it ever has been in his possession, as trustee.

The court of chancery awarded the attachment.

On motion of Taliaferro, the court suspended the operation of the attachment, on payment of the principal, interest and costs now due, on the decree, to enforce the performance of which the attachment was awarded.

At a subsequent day, Taliaferro filed an affidavit, in which he declared, that none of the negroes or other property conveyed to him, in trust, by Alexander, by the deed of the 16th day of December, 1804, were, at that time, or at any time since the execution of the said deed, in his possession, or in any manner under his direction; that the negroes referred to as being in his possession, are certain slaves conveyed to him in trust, by the deed of the 10th of October, 1802; and that he had no property in his posses-

sion, nor ever had had, liable to the decree of the chancellor, pronounced in this cause.

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On the ground of this affidavit, Taliaferro moved the court to set aside the order for the attachment, but the court being of opinion, "that although the negroes, chariot and horses have not, at any time, as stated in the affidavit, been in possession or under the control of the said John Taliaferro, yet the rent due by him of six hundred pounds annually, to the female defendant, during her life, is liable in like manner with the other estate comprised in the said deed," rejected the motion.

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From this order, an appeal was allowed by a judge of the court of appeals.

Wickham, for the appellant, contended, that as the decree on which the attachment issued, related only to the *personal estate* of Alexander, in the possession of J. Taliaferro, and he having declared upon oath that such estate was not, nor ever had been, in his possession, the attachment ought to have been discharged. But the chancellor, admitting that the affidavit is satisfactory as to the negroes, and chariot and horses, supposes that the decree of the court embraces the *rents due from Taliaferro to Mrs. Alexander*; and, on that ground only, sustains the attachment. But this was clearly not the case. Not a word is mentioned about *rents* in the decree. It is confined entirely to the *personal estate* of Alexander, and to such only as should be in the possession of John Taliaferro and Lucy Alexander. These words cannot, by any fair construction, be made to comprehend a *debt* due to Lucy Alexander. The decree manifestly relates to the slaves and other personal estate, which had been conveyed by the deed of 1804, and is of such a tangible nature that *possession* might be had of it. The attachment was therefore improvidently awarded, and the order of the chancellor ought to be reversed.

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Stanard, for the appellee. The first question to be considered is, whether the decree embraced the *rents*, or was confined to the personal property of Alexander in the hands of Taliaferro? By the decree, the deed of 1804 was set aside *in toto*; and consequently, no species of property could be protected by it, against the claims of creditors. The *rents* were as proper a subject for a decree, as any other portion of the personal estate. The annuity was in the hands of Taliaferro, at the time of the decree being rendered. The words of the decree were sufficiently comprehensive to embrace the rents. *Personal estate* includes *choses in action*, as well as things *in possession*.

But the affidavit of Taliaferro was too loose and equivocating, to discharge him from the attachment for contempt. It does not deny any collusion between himself and others, to produce the incapacity to perform the decree. It does not aver that he had no *control* over the property, but merely says that he had no *possession* of it as *trustee*. Neither the first nor second affidavit are satisfactory. They are not such, as if false, would subject Taliaferro to a prosecution for perjury. It might be true that he had not *possession* of the property, and yet he might have employed others to hold it for him. He might not have had *possession*, and yet he may have had a perfect *control*. He may have had *possession*, and yet, not possession as a *trustee*.

In addition to this, the affidavits do not appear, upon their face, to have been taken in any *judicial proceeding*. They are, to all appearance, mere voluntary oaths, taken in *pays*. Such affidavits are not sufficient to support a prosecution for perjury, even if they are untrue.

Wickham replied, that the decree was only against the person who was in *possession* of the personal property. It is of no importance whether another decree *ought to have been made*; but the only question is, what was the *actual* decree. The property was still within the reach of

the court. The return of the officer proves, that Lucy Foote, one of the defendants, acknowledged that *she* was in possession of some of the negroes, but would not deliver them up. *She*, therefore, was the proper object of the process for contempt, and not Taliaferro. There is clearly no order about the rent. The affidavit was full enough. The expression that the property was not in his possession, nor in any manner under his direction, is equivalent to saying that it was not *not under his control*. As to the formal objection, that the caption of the affidavits do not shew that they were taken in a judicial proceeding, the whole tenor of the affidavits, the accompanying circumstances, and the use that was actually made of them, are sufficient to prove that they were intended only for that very case in which they were used. The objection comes too late in the appellate court; but should have been suggested in the court of chancery.

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December.
Taliaferro,
vs.
Horde's
adm'r.

December 6th.—Judge CABELL, delivered the opinion of the court:

The chancellor not having entered up any decree against the appellant, directing him to pay to the appellee, any portion of the rent of 600*l.*, which, by the deed of the 16th of December, 1804, he was annually to pay to Mrs. Alexander, during her life; this court will not anticipate the question of *his* liability to the appellee therefor. The only questions deemed necessary to be decided at present, are those relating to the attachment. The process for contempt lies for disobedience of what is decreed, not for what *may be* decreed. In this case, it is manifest that the appellant has not refused obedience to any thing that was required of him by the decree. The order awarding the attachment, as also that refusing to set it aside, are therefore reversed with costs, and the attachment set aside, and the cause is remanded, &c.



Knibb's executor against Dixon's executor.

1822.
December.



In a suit in Chancery, where fraud is not put in issue by the pleadings, it cannot be introduced by the depositions.

On a question whether an absolute bill of sale was intended only as a *security*, the evidence being contradictory, a Court of Chancery ought to direct an issue to try that point.

This was an appeal from the chancery court of Williamsburg, where Knibb filed his bill of complaint against Tyler, executor of Dixon.

The case stated in the bill was this :

Knibb being reduced in his circumstances, and much pressed by his creditors, and most of his personal property taken under execution, executed a bill of sale purporting to be an absolute deed to Dixon, for a negro woman and her daughter. The said bill of sale, though absolute on its face, was intended by the parties to be a trust; the said Dixon engaging, that if any more debts should come against the complainant, he would discharge them, and rely on the property so conveyed, for his indemnification. Dixon took the negro woman home, but left her daughter in the possession of the complainant. The deed was acknowledged and recorded in Charles City county. After the complainant had liberated himself from his difficulties, Dixon frequently pressed him to take back his woman and her increase. But they were suffered to remain with the said Dixon, with his permission, until his death. The said Dixon never paid any consideration for the said slaves, nor paid any debt for the complainant. The executor of Dixon refuses to deliver the said property to the complainant, and has even brought a suit at law for the girl who had been left in the possession of the complainant. He therefore prays that the said executor may be compelled to deliver up the said slaves to

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Knibb's
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ex'or.

the complainant; that he may account for the value of their services from the death of the said Dixon; and annul, cancel and destroy the said bill of sale.

The executor of Dixon relies upon the bill of sale, as evidence of an absolute transfer of property to his testator, and denies all knowledge of any secret trust between the parties: that it is not lawful for the complainant to avail himself of any fraudulent act to deceive his creditors: that Dixon almost supported the complainant's family, and the respondent has paid many accounts for the said Knibb, since the death of Dixon, out of his estate: that he believes that five times the value of the said slaves, has been advanced at various times, by the said Dixon to the said Knibb, to relieve him from distress and misery: that he has always understood that Dixon left the slaves in possession of Knibb, for the use of his wife, on loan: that Knibb falling out with her, as the respondent is informed, sent the slaves home to Dixon, saying he would not raise young negroes for Dixon; but again got possession of the girl Chloe, &c.

Depositions were taken on both sides to prove the trust; the advances made by Dixon for Knibb, and the value of the negroes.

Knibb having died, the suit was revived in the name of his executor.

The chancellor dismissed the bill upon a hearing, and Knibb's executor obtained a supersedeas.

W. F. Wickham, for the appellant.

Stanard, for the appellee.

It was said for the appellant, that the deed in question was intended as a trust, and not as an absolute sale; as is proved by all the depositions, and the declarations of Dixon himself. There was nothing fraudulent in the transaction. The creditors of Knibb could not suffer, because Dixon became bound to pay his debts. Besides, fraud

is not put in issue by the pleadings. Both plaintiff and defendant rest their case on grounds quite distinct from that of fraud. If money was paid by Dixon for Knibb after the conveyance, the chancellor should have directed an account of the sums so paid, and permitted Knibb to redeem the property, upon re-imbursing Dixon.

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For the appellee it was said, that the witnesses who proved the trust were near connexions of Knibb, who were probably under his influence; while the subscribing witnesses to the bill of sale, who had the best opportunity of knowing the real nature of the transaction, are not produced. If the conveyance was fraudulent, Knibb cannot avail himself of it, even although the question of fraud is not put in issue by the pleadings, but comes out in the evidence. In this case, fraud could not have been charged either in the bill or answer. Knibb would certainly not have charged it, because it would have been fatal to his claim; and the executor of Dixon could not have alleged it, because he was ignorant of the transaction. This case is similar to that of *Bishop vs. Estes*, (a) in this court, where a conveyance of the same sort was set aside. The court below, upon weighing the evidence, were of opinion, that the conveyance was an absolute one, as it purported to be upon its face; and, therefore, there was no necessity to direct an account.

December 12.—Judge BROOKE, delivered the opinion of the court.*

The court excluding the evidence in relation to the supposed fraud of the appellant, it not being put in issue by any thing in the pleadings, is of opinion, that the conflicting evidence touching the question, whether the bill of sale from Knibb to Dixon, was intended by the parties as a security to Dixon, for payments to be made by him in behalf of Knibb, or as an absolute and unconditional

(a) Not reported. Decided Oct. 20, 1820.

* Judge Green did not sit, the case having been argued before his appointment.

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December.

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ex'or.
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ex'or.

transfer of the property, ought to have been submitted to a jury, by an issue to be made up between the parties ; on the trial of which, the weight of that evidence would be more correctly ascertained than by the chancellor. The decree dismissing the bill, is therefore reversed, and the cause remanded to be further proceeded in, according to the principles of this decree.

1822.
December.

Trigg and wife *against* King's representatives.

A testator gives to his two nieces, \$10,000, "in twelve months after marriage, "provided they are then eighteen years of age ; if not, at the age of eighteen." Although these words import a *joint interest* in \$10,000, they may be explained by circumstances to be collected from other parts of the will, to mean a legacy to *each* of his nieces, of \$10,000.

This was an appeal from the superior court of chancery, holden at Wythe court-house.

Joseph Trigg and Elizabeth his wife, filed a bill against Lilbourn L. Henderson and others, representatives of William King deceased, claiming a legacy of \$10,000, which had been left to the female plaintiff by his will, who, before her marriage, was Elizabeth Findlay. The clause in question was in these words : "To my nieces Elizabeth Findlay, and Elizabeth Mitchell, (being called after my grandmother with whom I was brought up,) ten thousand dollars in twelve months after marriage, provided they are then eighteen years of age ; if not, at the age of eighteen." In the preceding clause, he gives a

like sum of \$10,000 to his nephew Connally Findlay. The testator was a man of large estate, and believed himself fully able to pay all the legacies.

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Trigg and
wife,
vs.
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presenta-
tives.

Henderson, the executor, answered, that he interpreted the will to give nothing more than 10,000 dollars to *both* the legatees; that, under that construction, the female plaintiff would only be entitled to \$5,000, which he had already paid to her: that in other parts of his will, whenever the testator intends a several legacy, he is careful in saying to *each* of the legatees, &c.

The other defendants answer to the same effect.

The chancellor dismissed the bill, and the plaintiffs appealed to this court.

Wickham, for the appellants.

No counsel for the appellees.

December 14.—Judge **BROOKS**, delivered the opinion of the court.*

The court is of opinion, that the words of Wm. King, the testator, used in the devise to the female plaintiff, and Elizabeth Mitchell, his two nieces, are not so imperative as to compel the court to adopt a construction of them, in conflict with the intention of the testator, to be collected from that and other parts of the will. It is evident to the court, that the testator believed himself able to give to his two nieces \$10,000 each. He assigns in the clause the reasons why they were his favourites. That sum is given in the preceding clause to his nephew, Connally Findlay, and, as is said by the chancellor, seems to be a favourite one. The devise to the young man who should remain in his service at his decease, is clearly a several devise, though the language would equally seem to import a joint interest in the legatees. The words in the clause in question, are, “to

* This cause having been argued before the appointment of Judge Green, he did not sit in it.

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"my nieces, Elizabeth Findlay and Elizabeth Mitchell, \$10,000 in twelve months after marriage, provided they are then eighteen years of age; if not, at the age of eighteen." It is true the language imports a *joint interest*; but, in effect, must be understood as intending a *several interest*. It was improbable that his two nieces would marry at the same point of time; nor does it appear that they would arrive at the age of eighteen at the same period. He must have intended that each of his nieces should have \$10,000 at the periods mentioned, or it is believed he would have used other words, or have added some in explanation. On the whole, the court is of opinion, that the female plaintiff was entitled to receive \$10,000 at the expiration of twelve months after marriage, if she was then eighteen; or, at the age of eighteen, if then unmarried.

The decree dismissing the bill is therefore reversed, and the cause remanded for further proceeding, according to the principles of this decree.

Butts against Blunt and others.

1822.
November.

In ejectment, where the lessor is a fictitious person instead of the lessee, evidence on the part of the plaintiff, not going to shew a title in the lessor, ought to be excluded.

Although the act of Jeoffails, cures any objection of form or substance to the declaration in ejectment, after issue joined, yet it does not dispense with the rule, that the evidence must be relevant to the issue.

Depositions ought not to be admitted in a suit at law, unless it appears by the record in what suit and by what authority they were taken, and that the witnesses could not attend at the trial.

This was an action of ejectment brought in the county court of Southampton, by Samuel Blunt and others, trustees of the Nottoway Indians, against Daniel Butts, for a messuage and fifty-nine acres and a half of land. The declaration laid a demise from *Aaron Burr* to the said trustees. An issue was made up on the plea of not guilty. The jury found a verdict for the plaintiffs, and the court rendered judgment accordingly.

At the trial, the defendant excepted to the opinion of the court admitting certain depositions to be read in evidence. There is no commission contained in the record for taking these depositions. It is not stated whether they were taken in chief, or *de bene esse*; nor was there any evidence that the witnesses were dead or unable to attend the trial. These depositions go to prove the general reputation, that the lands in question were *Indian lands*.

An appeal was taken to the superior court of Southampton, and the cause was afterwards removed to the superior court of Dinwiddie; and that court affirmed the judgment.

From this judgment, the defendant appealed to this court.

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November.

Gilmer, for the appellant.

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others.

The depositions were improperly permitted by the county court, to be read in evidence. 1. Because no suit was pending at the time they were taken. They were taken on the 29th March, 1809, and the suit was brought on the 18th June, 1811. 2. There was no previous *affidavit* to warrant the issuing of a commission, and there does not appear to have been any commission. 3. There was no *notice*; for the certificate of it in the caption of the depositions is not sufficient. 4. The persons who took the depositions do not appear to have been *justices*. There is no consent to cure all these errors.

These objections are sustained by the cases of *Minnis vs. Echols*, (a) and *Collins vs. Lowry*. (b) They also shew that depositions in such a case can only be taken *de bene esse*, unless by consent; and then certain steps must be taken, which have been wholly omitted in the case at bar.

But even if they had been regularly taken, they ought to have been excluded, on account of their *matter*. They are intended to establish a right to *real property* by *hearsay evidence* and *general reputation*. Even in cases of *boundary* of old manors, it is necessary to prove *occupation*; that the witnesses were dead, and in a situation to know the facts. (c) But the *right* to real property, never was proved by such evidence.

The patent to Simonds Butts, from whom the appellant regularly derives his title, cannot be impeached in an ejectment. (d)

Leigh, for the appellees.

As to the objections to the *irregularity* of the depositions, they ought to appear upon the face of the record;

(a) 2 H. & M. 31.

(b) 2 Wash. 75.

(c) Phil. Evid. 182-3; *Nicholls vs. Parker*, note 14, East, 331.

(d) *Witherington vs. McDonald*, 1 H. & M. 306.

otherwise, they cannot be urged for the first time, in the appellate court. It is incumbent on the party excepting to the opinion, to set forth the alleged error ; not on the prevailing party, to shew that the judgment is right. All *presumptions* are in favor of the judgment of a competent tribunal. The preliminary steps in taking depositions, are frequently omitted in records, from the mere circumstance, that no notice was taken of them in the court below ; and it would operate as a surprize on a party, to state those objections for the first time, on the *appeal*.

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Batts
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others.

The objection to the *substance* of the depositions, cannot be sustained ; for it amounts to this, that a person claiming under a previous grant of the commonwealth, made and sanctioned by law, cannot prove that certain lands are within that grant, in opposition to a patent for them, obtained one hundred years after the grant. The title of these Indians is distinctly recognized by numerous acts of Assembly ; particularly by the acts of August, 1734, February, 1779, November, 1792, and December, 1803. Indian lands were never subject to location.

November 28th.—Judge BROOKE, delivered the opinion of the court.

The declaration in this case, avers the lease to have been made by *Aaron Burr*, to the appellees, and the plea of not guilty, puts his title in issue. Although the act of Jeofails, prohibits any exception of form or substance to the declaration in ejectment, after issue joined, yet the court is of opinion, that it does not dispense with the rule, that the evidence must be relevant to the issue. The depositions objected to in the bill of exceptions, prove nothing in relation to the title of *Aaron Burr*, the lessor of the plaintiffs ; and on that ground were improperly admitted to go in evidence to the jury.

The court is farther of opinion, that it not appearing by any thing in the record, in what suit or by what autho-

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Butts
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others.

rity, they were taken, nor that the witnesses could not attend at the trial, (and not deciding whether they were proper evidence of boundary) that the county court erred, on that ground also, in permitting them to go to the jury.

The judgments of both courts are therefore reversed, and the cause remanded; the verdict to be set aside, and a new trial to be had.

1822.
December.

Crouch against Puryear, &c.

It is not waste in a tenant in dower of Coal lands, to take Coal to any extent, from a mine already opened, or to sink new shafts into the same veins of Coal.

The tenant may penetrate through a seam already opened, and dig into a new seam that lies under the first.

John G. Crouch filed a bill of injunction in the Richmond chancery court, against Puryear and his wife, McRae and Dorrington, praying that they may be enjoined from working any new coal-pit opened since the death of John Ellis, and from removing the coal that has been raised from the said new pit.

The case stated by the bill is this :

John Ellis died intestate, leaving a widow and three children. At the time of his death, he was seised of about 234 acres of land in Henrico county. Upon the assignment of the widow's dower, the portion of land which was allotted to her, contained a mine of coal, which had been worked to a small extent, in the life-time of her husband. The widow afterwards intermarried with Puryear the de-

fendant. - Puryear, or some person claiming under him, caused another pit to be opened on the dower land, and proceeded to raise coal therefrom ; but a suit being threatened, he desisted. The plaintiff, Crouch, afterwards purchased the rights of the children ; and thus became entitled to the whole of the said tract, subject to the dower aforesaid. McRae and Dorrington, having purchased a lease of the said dower land, are preparing to resume the working of the said new pits, and to open one or more other pits or other seam or seams of coal, and to work them on a very large scale. The plaintiff, therefore, prays an injunction to stop the defendants in their proceedings aforesaid ; more especially, as he does not consider them able to make compensation, if the mischief shall be once perpetrated.

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The chancellor awarded the injunction.*

McRae and Dorrington filed their joint answer, admitting the lease to them, and their intention to go on and take coal *from the mine opened by the said John Ellis*, and for that purpose they mean to sink shafts and do such other things as are required for the full enjoyment of their rights under the lease, without committing waste : that they, as representing the rights of the widow, are authorised to take coal *from the said mine, without stint ; and that it is not waste to sink shafts or to pursue the coal belonging to the said mine, in every direction, and to every extent they may think proper to obtain the coal.* They admit, that there was another shaft sunk at the distance of a very few yards from the pit opened by the said John Ellis, before the lease to them ; but by whom it was done, they know not. The defendants are working the said last-mentioned shaft, which they conceive they have a right to do ; not only because they believe that all the coal upon the said dower lands *are part of the same mine, (having no reason to believe, that there is any other distinct*

* The injunction was awarded by judge Green, then chancellor of the Fredericksburg district.

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body of coal on the dower lands,) and that the shaft on which they are working passes through the seam or vein, which was opened by the said John Ellis in his life-time; but because, upon the principles of law and common sense, a mine once opened, is regarded every where. This doctrine is the more reasonable, as the lands where a mine is situate, are usually sterile and of no value, except for the mineral; and, therefore, to deny the free use of it, would be to deprive the doweress of all benefit from the endowment.

Ellis Puryear and his wife also filed their answer, which contains, in substance, nearly the same matter as the answer of McRae and Dorrington.

Upon motion of the defendants, the chancellor dissolved the injunction: being of opinion, that the two seams or strata of coal are proved to be connected by a substance of slate and coal throughout, and should be regarded as forming the same mine, according to the understanding of the colliers in England and Scotland, in like cases; and if so, the tenant for life, in right of her dower, might, upon common law principles, work the old shaft to every reasonable purpose, *without stint*; and, upon the same principles, she might open new pits or shafts for that purpose.

The plaintiff, Crouch, obtained an appeal from this order of dissolution.

Stasard, for the appellant.

This case may be viewed under two aspects. 1. Upon the supposition that this vein of coal was opened in the life-time of the husband. 2. Upon the idea that the vein was a new one not opened before. I contend that, in either case, the appellees were guilty of waste, and ought to be restrained by injunction.

1. The only question on the first point is, whether a widow is entitled to work a vein of coal already opened, *to any extent*? It is remarkable, that the English books should contain so few cases on this subject. A short passage in Coke upon Littleton, (a) contains almost every thing that is useful on the present occasion; for Bacon, Comyns and Viner, are mere repetitions of the doctrines of Coke. Mines of coal are not like fisheries, inexhaustible in their nature, and indefinite in their enjoyment; and, therefore, it depends upon the discreet conduct of the tenant, whether the reversion will be valuable or otherwise. The rights of the heir are particularly regarded by the English law. The question always is, whether any act will impair the inheritance? The privileges of *housebote*, *hedgebote*, &c. are not exceptions to this rule, but tend to confirm it. They are all for the benefit of the heir, and result from the duty of the particular tenant, *to preserve the inheritance*. The extent of the tenant's right is to be determined by the use, which the owner of the fee simple himself made of the property. Thus, the tenant for life can only repair houses already in existence, but cannot erect *new ones*. It is waste to convert *meadow* into *arable* land, or *wood land* into *arable*. The digging of coal cannot possibly promote the advantage of the heir; because it diminishes the stock from which the heir may derive revenue. The true limitation can only be found in the extent, to which the owner of the fee simple worked the mine. On the supposition, therefore, that this pit was opened in the life-time of Ellis, the intestate, the appellees ought to be restricted to the same use that *he* made of the pit; and as it is proved and admitted, that the appellees are preparing to work the mine much more extensively than Ellis ever did, the injunction ought not to have been dissolved.

2. Upon the supposition that the appellees are working a *new vein*, (which is the fact,) the law is still more clear

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(a) Co. Litt. p. 54, 6.

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in favor of the appellant. The cases which will be relied upon on the other side, will be found, on examination, not to support the right claimed by the appellees. The case of *Findlay vs. Smith*,^(b) was governed by the value of the property and the terms on which it was devised; the relationship of the devisees to the testator; the heavy charge he had imposed on the life estate, and the intention to be inferred from these considerations. As to the case of *Clavering vs. Clavering*,^(c) it may be remarked, that it goes further than any other case in the English books, and that it was not a decision of the right, but a refusal to grant a *peremptory injunction*, when the plaintiff had a remedy which he might resort to, without hazarding the great and irremediable loss that might result from the injunction. But, that case is distinguishable from the present, in one important point. The *mine* itself was the subject leased, and not as a mere *incident* to the tenancy of the *land*. But, all that the tenant claimed in that case, was a right to sink new shafts into the *old vein*. *Mine* and *vein* are synonymous. But, here the *new vein* is separated from the *old one* by a horizontal *stratum* of slate, which renders them totally distinct. The appellees cannot reach this new vein, without penetrating through the old one, and the stratum of slate that lies between them. *Stoughton vs. Lee*,^(d) proves, that the term *mine* applies to the *stratum* of coal which has been opened.

Call, Wickham and Nicholas, for the appellees.

The case of *Clavering vs. Clavering*, is a decision in point, and *Findlay vs. Smith*, follows up the principle and confirms it. It is decided, in those cases, that a tenant may dig new pits into a *mine* that is already opened. The question, therefore, really turns upon the meaning of the term *mine*.

(b) 6 Munf. 134. (c) 2 P. W. 388. (d) 1 Taunton, 402.

To ascertain its meaning, we should resort, not to legal precedents, but to the opinions of men skilled in the particular art or science in question. Every art has its own peculiar language; and it is impossible to speak with the necessary precision, if we employ words of science in their vulgar acceptation. Assuming this standard, we shall find that the term *mine*, includes the whole mass or *vein* of coal, contained within the land, held by the tenant. A *vein* is not synonymous with a *seam* of coal. A *vein* or *mine*, (which is the same thing,) contains many *seams*. These *seams* may be separated from each other, by *strata* of slate or other matter, but they are all included in the same *mine*. Every mine or vein, lies in different *seams*. These ideas are fully confirmed by all the treatises that have been written on the subject.^(c) In *Clavering vs. Clavering*, the word *vein* or *mine* is used in the same sense. When, therefore, that case decides that new shafts may be sunk in an open *mine* or *vein*, it says in effect that the tenant may bore into every different *seam* composing that mine. It makes no difference, whether the seams are separated by a *horizontal* or *perpendicular* stratum of slate. They are equally parts of the same vein.

Mr. Stanard's idea, that the rights of the tenant are only intended for the benefit of the reversioner, is not supported by any authority. Whenever the law gives any estate, however small, it gives the right and the means of enjoyment. Indeed, it is impossible to give any rational account of some of the acknowledged privileges of a tenant, such as *fire-bote* for instance, upon such a principle. This privilege certainly cannot produce any advantage to the reversioner. The more obvious principle is, that the law intends each estate to be enjoyed in its fullest extent; and even where the full enjoyment of the particular estate, may impair the rights of the reversioner, the law will not *contract* the rights of the tenant. This happens

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(c) Kirwan's Geological Essays, 291. *Id.* 296. *Id.* 203. *Id.* 308. Homes on Coal Mines, 14. Encyclop. (Dobson's Edition,) vol. 5, art. (Coal.)

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in regard to those things that are consumed in their use. A pipe of wine, for example, may be given to one for life or years, remainder to another. But it will hardly be said, that the tenant would be restrained in the enjoyment of his estate, although he may leave the reversioner, only an empty cask.

But it is not admitted, that the free use of a coal mine, will produce any injury to the reversioner. On the contrary, the sinking of shafts is a benefit to him; because it relieves him from the expense incident to exploring for coal. There is no instance of a coal mine being exhausted.

W. Hay, junr. in reply.

Mr. Stanard's first position remains unrefuted. But, let it be conceded that he is incorrect, when the question is stated as a general one; still there are facts in this case, which will justify the court in imposing upon the widow and her assignees, the restriction for which he has contended.

The case of *Sloughton vs. Lee, (f)* shews, that notwithstanding there may be an open mine, in lands of which a widow is endowable, that the assignment may be of a third in value, without reference to the mine; and, that if an open mine be assigned, an estimate should be made of its annual profits.

There is no pretence for saying, that such an estimate was made in this case; and there is the strongest ground for contending, that the assignment was intended to be of a third in value, without reference to the mine. It appears, from the deeds which are exhibited, that the widow has received a third of the land in quantity, including the mansion; and if an unrestricted right to work the mines was allowed her, the assignment was excessive. That such a right was not in the contemplation of the parties, is very manifest from the deed to her assignees; in which

(f) 1 Tammou.

they are laid under a restriction as to working; until it was *judicially* determined that she herself had a right to do it; a doubt as to her authority, which surely could not have existed, if the profits of the mine had been estimated as they ought to have been in the assignment.

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But, whatever may be the fate of this question, there can be no doubt, that upon the authority of *Clavering vs. Clavering*, she is to be restricted to the old vein, and cannot open a new one; and the controversy turns upon the import of that term. It is used by the court as a term embracing only a part of the same mine, and as *restrictive* of the rights of the tenant; and in this view, cannot have any other signification, than *seam* or *stratum*. The case of *Stoughton vs. Lee*, is a direct authority for this position. In fact it goes further; it shews that *mine* and *stratum* are in legal intendment synonymous. *Mine*, or *stratum*, is the language of the court in the case sent to be determined at law, and the same terms are used by the law court in its certificate, which determined that in the open *strata* the widow was endowable, but not in those which were unopened; and there were several of each kind upon the same land.

This construction receives additional support from the same case, which decides, as stated above, that where an open mine is assigned for dower, an estimate must be made of its annual profits. It is not easy to conceive, in what manner this estimate is to be made of the profits of *strata*, the existence of which is not ascertained, and which may be indefinite both in number and extent. No mode can be pursued, but to consider the visible *stratum* as the *mine*, the profits of which are to be ascertained.

The appellees can derive no support from the writers on Geology and Mineralogy, who have been cited. Let their authority be conceded; let the accounts which they give, of the structure of mines, be correct. Let it be admitted that the term *vein* is technically never applied to *minerals*, but only to *metals*; and that the term *mine*,

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&c.

when understood scientifically, embraces an indefinite number of *strata*. What is their bearing on this case? The point for the decision of the court, is not the *technical*, but the *legal*, import of the terms, in the adjudged cases. This only can be brought to bear upon the question. If the term *vein* is used by the court, as synonymous with *seam* or *stratum*, the word must be received in the sense in which *they* used it, although it may not be correct in technical language.

But the authority of these writers is not admitted. A court may, with propriety receive information upon questions connected with science and trade, from persons conversant with them; but it must be derived from their *testimony*, and not from their *writings*. Such was the mode adopted in *Clavering vs. Clavering*. Works of this nature, are not like general histories, to which it is conceded that courts may sometimes have recourse. But this is only as to matters relating to the country at large, and never upon questions of private right, or as to particular customs. *Cumden's Britannia*, a work of great authority, was rejected upon a question somewhat like this. (g)

As little support can the appellees receive from domestic precedents. The case of *Findlay vs. Smith*, which was cited as *running upon all fours*, is surely very unlike the present. The majority of the court who decided it, expressly found the decision, not upon common law principles, but upon the rights conferred on the widow by the will, which laid her under no restrictions. In addition to which, it was admitted that the saline mineral was inexhaustible; and there being no restriction upon the use of that, the right to use the fuel was co-extensive.

The case of tenants in common, who are owners of the inheritance in coal mines, has as little application. The subject is, from its nature, incapable of partition; and if one tenant, through folly or obstinacy, will not contribute to the expense of the works, the other who is willing to

encounter it, should be permitted to derive a profit from them.

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December.

As to the argument derived from the absence of British decisions (from which it is inferred, that the right claimed by the appellees, was never disputed,) it may, upon the same ground, and with the same propriety, be urged, that such a pretension as theirs, was never before advanced. If the law upon this subject, had been so well settled as not to admit a dispute, it is a little remarkable, that the case of *Stoughton vs. Lee*, should have been sent from the court of chancery, to the court of common pleas, at this late period, to determine, not merely the *extent* of the widow's right to work mines, but whether *she had any right at all*; and this too, in a country in which collieries have been in vigorous operation for many centuries.

Crouch
vs.
Puryear,
&c.

The case of *Gibson vs. Smith*, (*h*) is a decisive answer to the statement, that a coal mine cannot be exhausted, and that the reversioner sustains no injury, but on the contrary, derives a benefit, from the unlimited working of it. It decides that a mere *threat* to commit waste in a colliery, is sufficient to warrant the interposition of the court; and this too, in a case in which it never interferes, but upon the ground of irreparable injury. And it must be manifest, that whether the mine can be exhausted or not, the more it is worked, the greater must be the labor necessary, and of course the *expense*.

Ledbetter's deposition, to which so much importance has been attached, proves at most, only what the colliers in some parts of England, in common parlance, understood by the term *mine*. But, even as to *this* point, it is not explicit, but affords only his opinion. But had it been explicit, it is short of the evidence upon which the case of *Clavering vs. Clavering* was decided, and which went to shew the *usage* as to tenants, for life or years, of collieries.

Whatever restrictions the law imposes upon conventional tenants, as to whom the reversioner has a right to im-

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pose his terms, are, *a fortiori*, applicable to a tenant in dower, who comes to her estate by act of law.

Crouch
vs.
Puryear,
&c.

December 19.—Judge BROOKE, delivered the opinion of the court, that the decree should be affirmed.*

* Judge Green did not sit in this cause.

1823.
January.

Jones against Lucas.

Where, on a trial at law, a deposition is introduced, taken regularly under a commission, and an objection is made to some of the questions as leading questions, the court cannot suppress the improper questions and answers, after the jury is sworn; but the objection should be made to the court before the jury is sworn, and the improper questions and answers suppressed.

Lucas brought an action of trespass on the case, in the superior court of Mecklenburg county, against Jones, for a fraud in selling him an unsound negro. At the trial, the plaintiff offered in evidence, the deposition of Amy B. Jones, taken under a commission. The defendant moved the court to exclude from the jury, certain answers contained in the deposition, to questions which were leading ones. The court overruled the motion, and permitted the answers in question to go to the jury; to which opinion the defendant excepted. A verdict was rendered for the plaintiff, and judgment accordingly. The defendant appealed to this court.

The case was submitted without argument.

January 21.—Judge BROOKE,* delivered the opinion of the court.

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The court is of opinion, that the objections taken in the bill of exceptions, to the deposition referred to, came too late. Although the questions were leading questions, calculated to inform the witness of the answers expected by the party propounding them, and therefore improper; yet, after the jury were sworn, it would have been irregular to suppress the deposition, there being no objection to the competency of the witness. Before the jury were sworn, on motion, the questions and answers objected to ought to have been suppressed by the court. Afterwards, and upon the trial, the objections could only go to the credit of the witness. The judgment is, therefore, to be affirmed.

Jones
vs.
Lucas.

* Judge Cabell absent.

Triplett against Micou.

1923.
January.

Where a suit is brought against two persons on a bond executed by both, and it abates as to one by his death; a verdict finding only that the surviving defendant hath not paid the debt, is bad, and a new trial must be awarded.

John Micou, as agent for, and suing for the benefit of, Judith Matthews, brought a suit in Henrico superior court, against Daniel and Philip Triplett, on a bond executed by them in the penalty of \$ 360, and conditioned to pay half that sum, and to return two negro men, which had been hired, well-clothed. The declaration in its com-

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Triplett
vs.
Micou.

mencement, describes the action to be "a plea of breach of covenant." It then states that the said Triplett, by their writing obligatory, *covenanted and agreed*, for the hire of two negro men, to pay to the said Micou \$ 360, to be discharged by \$ 180, and to return the negroes well clothed. It concludes thus, "and the said Micou, in fact saith, that the said Triplett, although often required, did not pay to him the said Micou, the sum of \$ 180, on or before the first of January, 1818, or return the said negroes well clothed, as he stipulated to do; but his said undertaking to perform constantly refused, and still *doth* refuse; wherefore, an action hath accrued to the said Micou to have of the said Triplett, the penalty of \$ 360, and damages \$, and therefore he sues."

The suit abated as to Daniel Triplett by his death, and the appearance bail of the surviving defendant pleaded payment.

On the trial, the jury found a verdict to the following effect: "that the surviving defendant hath not paid to the plaintiff the debt in the declaration mentioned, as the plaintiff by replying hath alleged; and they do allow on the said debt, interest from the first day of January, 1818, till paid."

The court gave judgment for \$ 360 and costs, to be discharged by the payment of \$ 180 with interest, &c. and the defendant Philip Triplett obtained a supersedeas.

Nicholas, for the appellant.

Selden, for the appellee.

Two objections were made by the counsel for the appellant: 1. That the declaration is in *covenant*, and the proceedings in *debt*: That part of the demand which relates to returning the negroes well clothed, clearly belongs to *covenant*, and not *debt*. But the judgment is for the *penalty*. This can only be applicable to an action of *debt*.

2. The verdict only finds, that the *surviving* defendant did not pay, without saying any thing of the *deceased* defendant. (a)

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vs.
Micou.

For the appellee, it was said, that the declaration, tho' informal, was good after verdict. The character of the action is not fixed by the *conclusion* of the declaration, but by its general frame and structure. The averment of the breach relates to both the defendants. If the breach is co-extensive with the condition of the bond, it is sufficient. *Payment* is a good plea in covenant. (b) None of the cases support the objection to the verdict.

January 18.—Judge BROOKE, delivered the opinion of the court :*

The declaration in this case alleges, that both of the defendants covenanted to pay the money and return the negroes well-clothed. The suit abated, as to one of the defendants, and the appearance bail of the other defendant pleaded payment; to which there was a general replication. The verdict finds, that the surviving defendant hath not paid the debt in the declaration mentioned. Passing by the objection, that the verdict does not respond to the charge for clothing, (it being most beneficial to the appellant,) the court is of opinion, that it is defective in this, that it does not negative the payment of the money by the deceased defendant, which, upon the plea, was within the issue. The judgment is therefore reversed; and this court proceeding, &c. a new trial is awarded, and the cause sent back for further proceedings to be had therein.

(a) See the cases of Buckner and wife vs. Blair, 2 Munf. 336. Green vs. Dulaoy, 2 Munf. 518. Norvell vs. Hurdine, 4 Munf. 496.

(b) Hunnicutt vs. Carsley, 1 H. & M. 153. Hammit vs. Bullett's exor's. 1 Call, 567.

* Judge Cabell absent.

1823.
January.



Bagwell against Babe.

In a plea of *alien enemy*, it is necessary for the defendant to negative or affirm all the facts, that are required to bar the plaintiff's action.

Therefore, in such a plea, it is necessary for the defendant to state, not only that the plaintiff was an *alien enemy*, but also that he had not the license of the government to remain in the country.

It is further necessary, during the war of 1812, for the plea to affirm that the plaintiff had been ordered off by the executive of the United States; as, by virtue of an act of Congress, an alien enemy is permitted to remain in the country, until he is ordered to depart by the executive.

This was an action of assault and battery brought in the county court of Accomack, by George Babe against Charles Bagwell.

The declaration is in the usual form. The defendant filed two pleas: First, "that he, the said George, at the time of issuing the original writ of him, the said George, in this cause, was a subject of the King of Great Britain, then waging and carrying on war against this state, and the citizens thereof; and this, he the said Charles is ready to verify."

The second plea is, that as to the coming with force and arms, and also as to the battery and wounding aforesaid of him the said George, the said Charles is *not guilty*; and as to the residue of the trespass, assault and imprisonment, that he the said Charles was duly commissioned lieutenant colonel commandant of the 99th regiment of militia in the county of Accomack; and the said George Babe being a subject of the King of Great Britain, then at war with the United States, and the said George Babe not having become a citizen of the United States, "and being a suspicious man, who the said Charles Bagwell judged would have carried information of the military strength of his regiment to the enemy, at that time hovering on and near to the limits of the said 99th

“ regiment, the said Charles, by virtue of his authority
 “ as commanding the said regiment, *gently laid his hands*
 “ *upon the said George*, and arrested him, and took his
 “ body in custody and detained him in execution, until he
 “ was discharged ; which is the residue of the trespass,
 “ assault, and imprisonment aforesaid, &c.”

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The plaintiff demurred to the first plea, and concludes his demurrer by saying “ and for cause of demurring in
 “ law to the said plea, the said George Babe sheweth to
 “ the court here the cause following, to wit : that long be-
 “ fore the declaration of the present war between the
 “ United States of America, and the Kingdom of Great
 “ Britain, viz : in the year , he the said George,
 “ migrated from the Kingdom of Great Britain aforesaid,
 “ to the United States of America ; and has constantly
 “ resided in the United States of America since that time
 “ to the present day ; and this he is ready to verify.”

As to the second plea, the plaintiff replied, that the said Charles did not arrest and imprison the said George, for the cause and in the manner, as he in pleading hath above alleged.

The defendant joined in demurrer to the first plea, and joined issue on the replication to the second plea.

On the trial of the issue in fact, the jury found a verdict for \$ 225 damages ; and the court sustained the demurrer to the plea of *alien enemy*. The court gave judgment accordingly for the plaintiff, and the defendant appealed to the superior court of law for the county of Accomack.

The superior court affirmed the judgment of the county court ; and the defendant appealed to this court.

Nicholas, for the appellant.

Leigh and Upshur, for the appellee.

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It was contended for the appellant, that the court erred in sustaining the demurrer. The plea of *alien enemy* is a good and valid defence. The demurrer is a *general* one, and therefore no exception can be taken to the *form* of the plea. But the demurrer itself is irregular, because it brings forward a new *matter of fact*, viz : that the plaintiff was commorant in this country before the war; which is wholly incompatible with the idea of a demurrer. But, even if this fact were regularly pleaded, it could afford no protection to the plaintiff, from arrest. As an alien enemy he is liable to arrest, unless he is protected by a *safe conduct*, (a) and without it, he will not be protected. (b) When a plaintiff, by his replication, means to rely on a *special license* to remain in the country, he ought to allege that fact specially. (c) He ought to have replied that fact, instead of demurring.

The counsel for the appellee admitted that the plea of *alien enemy* applies to all sorts of actions, whether real, personal, or mixed; (d) but, an alien enemy coming into the commonwealth under a *safe conduct*, may maintain a personal action; or, if he come hither by license of government, and live under its protection, and war afterwards break out, he may maintain such action; otherwise, if he be commorant in his own country. (e) By *license*, is not meant an *express* license in each individual case; but *general permission*. (f) If this be not doubted in England, much less can it be doubted here, where our laws, state, and federal, give aliens in time of peace, not only permission to come to our country, but an invitation to come, and promise them the utmost favor.

It was formerly a question, whether the plaintiff must set forth, in his replication to the plea of *alien enemy*, the facts which entitled him, though an alien enemy born, to

(a) 1 Bac. Abr. 139.

(b) Wills vs. Williams, 1 Ld. Raymond, 282.

(c) 1 Chitty's Plead. 550.

(d) Co. Litt. 123.

(e) Wills vs. Williams, 1 Salk. 45; 1 Ld. Raym. 282.

(f) Daubigny vs. Davallon, 2 Anstr. 467.

sue; or whether the defendant must, in his *plea*, set forth all the facts which negative the plaintiff's right to sue. But it is now settled, that in such case, the defendant must plead all the facts that negative, and the plaintiff is not driven to reply the facts that sustain his right of suing. (g) "The plea" (says Lord Kenyon,) "must negative every presumption, that can arise in favor of the plaintiff's right to sue; as, that he came without a safe conduct, &c."

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The coming without *safe conduct*, is put for illustration; the plea, for the same reason, should state that the alien came, and remains *without license* or permission; and so the approved form of pleading alien enemy, is, that the plaintiff came into the country, and still remains, without letters of safe conduct, *and without license or permission*; or, that he is living out of the commonwealth, in his own country, adhering to the enemy. (h)

The plea in this case, therefore, is clearly naught. It only states, that the plaintiff was a subject of the King of Great Britain, and an alien enemy, that nation being then at war with our's; without stating, that he came and remained here without a safe conduct, and without license or permission, or that he was commorant in his own country, adhering to our enemy.

The demurrer to the plea is general, though it affect to set forth a special cause; which, however, exactly indicates the defect of the plea.

January 25.—Judge BROOKE, delivered the opinion of the court.

The court is of opinion, that the superior court correctly sustained the demurrer of the plaintiff, to the first plea of the defendant. Since the consequences of war have

(g) 1 Chitt. Plead. 238; *Casseres vs. Bell*, 8 T. R. 166.

(h) 2 Chitt. Plead. 425, 6.

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been greatly mitigated, especially as to non-combatants, the decisions of courts against alien enemies, have been less rigid. In the case of *Clarke vs. Morey*,⁽ⁱ⁾ the cases have been well reviewed. The plea in the case before the court, does not negative nor affirm all the facts, that were necessary to bar the plaintiff's action. It does not negative the license of the plaintiff to remain in the country, by virtue of the act of Congress, entitled, an act respecting alien enemies; nor does it affirm, that he had been ordered off by the executive of the United States, in pursuance of that act. Until such order, the act gives permission to the alien to remain, though his sovereign be at war with us. The other issues being found for the plaintiff, the judgment is to be affirmed.

(i) 10 Johns. Rep.

Lang against Lewis's administrator.

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January.

The same against the same.

It is error for a plaintiff to reply and demur to the same plea.

A replication by the administrator of a surviving partner, to a plea of payment, must aver that the debt had not been paid to the *deceased* partner.

A mere averment that the debt had not been paid to the *surviving* partner will not be sufficient.

A writ of *scire facias* need not set forth what goods, lands, &c. have been acquired by the defendant, since the date of the judgment.

It is not a good plea to a *scire facias*, that the defendant had transferred, conveyed, &c. to the sheriff, goods and chattels, lands, &c. according to the act of Assembly, to a greater value, &c. and that no proceedings had been had under the act of Assembly, against the said lands, &c.

Nor is it a good plea that the defendant had transferred, in like manner, various debts, &c. and that the proceedings prescribed by the act of Assembly, &c. to recover such debts, had not been had.

These were two writs of *scire facias* issued from the superior court of law of James City county, in the name of the administrator of George Lewis against George Lang, to revive two judgments obtained by Z. Litchfield and George Lewis against the said Lang.

After the rendition of the original judgment, Z. Litchfield, one of the plaintiffs, died; and on motion to the court, suggesting his death, it was ordered that an execution should issue, in the name of Lewis, the surviving plaintiff. A *ca. sa.* was accordingly issued and served upon Lang, who took the oath of insolvency, and was thereupon discharged.

George Lewis died, and Thomas James was appointed his administrator; who sued out the two writs of *scire facias* above-mentioned, suggesting, that since the discharge of the said George Lang, divers lands, tenements, goods and chattels, had been acquired by, or come to the possession of, the said George Lang.

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The defendant pleaded four pleas.

1. No such record.
2. That he transferred, conveyed, &c. goods and chattels, rights and credits, lands, &c. according to the act of Assembly, to a value greater, &c. and that no proceedings had been had, according to the act of Assembly, against the said lands, &c.
3. That he conveyed, transferred, &c. according to law, various debts, &c. and that the proceedings prescribed by the act of Assembly, &c. to recover such debts, had not been had.
4. That he had paid the debt. In one of the cases, the defendant avers that he had paid the said debt, to the said *George Lewis*; in the other, he avers that he had paid the debt *generally*.

To these pleas, the plaintiff filed replications and demurrers.

1. To the first plea, he replied that there was no such a record.

2. To the second plea, he demurred specially, and assigned the following causes of demurrer: 1. That the plaintiff was not bound to proceed against the lands, tenements and effects, if any transferred by the said *George Lang*. 2. That the plaintiff was not bound to summon the persons, if any, owing debts. 3. That the said plea is double. 4. That the said plea does not aver, that there were lands and effects, and debts owing. 5. That the said plea is in other respects, uncertain, informal, and insufficient.

The plaintiff also replied to the same plea, that there were not lands, tenements, and effects, sufficient in value, to satisfy his said debt, so transferred by the said defendant; and put himself upon the country.

3. To the third plea, the plaintiff replied, that there were not lands and tenements, goods and effects, and debts owing, and sufficient in value to satisfy his debts, so assigned and transferred by the said defendant, as in his said plea he avers; and of this he put himself upon the country.

To this plea, the plaintiff also demurred generally.

4. The plaintiff replied to the fourth plea, that the defendant did not pay *George Lewis* his testator, the sum recovered ; and concluded to the country.

The defendant joined in the demurrers ; and it is stated on the record, that issues were joined on the replications.

The court gave judgment, that the pleas of the defendant, were good in law, and overruled the demurrers of the plaintiff.

The issue " no such record," was decided by the court on inspection, and adjudged in favor of the plaintiff.

On the three other pleas, a jury was impannelled, and found a verdict in these words : " We of the jury, find " for the plaintiff, the debt, damages and costs, in the writ " of *scire facias* mentioned, and his costs in this behalf, " expended."

The court gave judgment, " that the plaintiff may have " execution against the defendant," for the debt, &c. and the defendant appealed to this court.

Wickham, for the appellant.

Upshur, for the appellee.

The counsel for the appellant relied on the following points :

1. That the writ of *scire facias* was defective, in not setting forth what goods, &c. lands, &c. had been acquired by the defendant, after the date of the judgment.

2. That the judgment of the court was right, on the plaintiff's demurrer to the second and third pleas of the defendant.

3. That judgment having been given for the defendant on these demurrers, that judgment should have been absolute for the defendant, and that the court should not have gone on to try the replications tendered by the plaintiff to these pleas, the plaintiff having no right, after

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demurring, to reply to the same pleas, and tender an issue both in fact and law; the right of filing several pleas being given to the defendant, and not to the plaintiff.

4. That the defendant, not having joined issue, no trial could be had. The statement on the record, that "*issues being joined, &c.*" is not sufficient.

5. That the replication to the fourth plea, of payment *generally*, was defective, as it only stated that the debt had not been paid, *to the plaintiff's testator*.

6. That the verdict was not good, as it did not find what lands, &c. goods, &c. had been acquired by the defendant, since his discharge.

7. That the judgment was erroneous in awarding execution against the defendant *generally*, instead of awarding it against after acquired lands, &c. goods, &c.

On the part of the *appellee*, it was said, that as to the first objection, the mode pursued was the most convenient, and that no principle or precedent required an exact statement of the after-acquired lands, in the *scire facias*; that it was impossible to ascertain at what time *personal* property was acquired; and as to *real*, the title papers being all in the hands of the defendant, *he* alone could know the date of its acquisition.

As to the demurrers to the *second* and *third* pleas, the court erred in over-ruling them, as the pleas presented no substantial bar to the recovery of the plaintiff.

With regard to the union of *demurrers* with replications on *matters of fact*, it is justified by the spirit of the law, which allows every matter of *law* or *fact* to be pleaded. The same reason exists in the case of a *replication*, as in that of a *plea*; and this court have already decided, that a replication in chancery, does not over-rule a demurrer. (a) There is a *similiter* in this case, which makes a complete issue. As to the *fifth* objection, the *fact* on which it is founded is denied, and must be decided by an inspection of the record.

(a) 4 Munf. 466, Eppes vs. Bagley.

The verdict is quite sufficient. It is a *general* one, and if it answers all the matters put in issue, it is good. It negatives all the facts set forth by the defendant in his defence.

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The seventh objection is founded on an erroneous impression, that the judgment warrants the issuing of a *capias ad satisfaciendum* against the defendant. The judgment must have relation to the *scire facias*; and that writ only demands execution of the *lands*, &c. which have come to the possession of the defendant, since the original judgment.

January 27.—Judge BROOKE, delivered the opinion of the court, in both cases.

In the first case :

The court is of opinion, that the superior court erred in permitting the plaintiff to reply and demur to the same pleas; yet, as these pleas allege no substantial bar to the action, and the issues in fact being all found for the plaintiff, the judgment is affirmed.

In the second case :

The court would also affirm the judgment in this case, for the reasons assigned in the other case, but the replication to the plea of payment which is general, only negatives the payment to Lewis the surviving partner. On this ground, the judgment is reversed, and all the pleadings, except the pleas of payment and no such record, are set aside, and the cause is remanded for further proceedings, and a new trial awarded, to be had therein.

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Harwell against Bennett and Walker.

On the trial of a writ of *ad quod damnum* to erect a mill dam, one of the jurors who signed the inquisition, gave evidence, that the sheriff who took the inquisition, declared in the presence of himself and another juror, that the defendant had consented to the erection of the mill-dam, in consequence of which, he (the juror) had agreed to sign the inquisition; this will not be a sufficient reason for quashing the inquisition.

This was a writ of *ad quod damnum* issued from the court of Mecklenburg county, on the petition of Bennett and Walker, to erect a dam 13½ feet high. Two inquisitions were returned and quashed. A third writ issued, on which an inquisition was taken and returned, favourable to the petition.

On the motion of James Harwell, he was admitted a defendant, and opposed the building of the said mill and dam.

On the trial of this writ and inquisition, the defendant introduced Dennis Roberts, one of the jurors who signed the inquisition, to prove that the sheriff, before whom the inquisition was taken, without knowing the opinion of the witness, said that the defendant had consented for the dam of the petitioners to be 13½ feet high: that the conversation was addressed to no particular person, and took place when the witness and James Pully, another of the jurors, were present: that in consequence of the said conversation of the sheriff, the witness agreed to sign the inquisition; without which he would not have done so, because he believes that the mill-pond made the neighborhood unhealthy; and that he had lived on the head of the pond for four or five years, and he believed it had given his family the ague and fever.

Upon this evidence, the county court quashed the inquisition. The petitioners filed a bill of exceptions, and appealed to the superior court of law.

The superior court reversed the decision of the county court, and sent the cause back for further proceedings.

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From this judgment, the appellee (Harwell) appealed to this court.

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Walker.

Gilmer for the appellant, contended that the county court did right in quashing the inquisition, on the evidence of the juror, and that the superior court ought not to have reversed that decision. He referred to the cases of *Anderson vs. Fox*, (a) and *Cochran vs. Street*, (b) to shew that such evidence as this, is sufficient to set aside a verdict.

W. Hay, Junr. contra. The evidence is inadmissible. It would afford an opportunity for tampering with a jury, if one or a few of the jurors might give evidence, going to impeach the verdict. In *Cochran vs. Street*, a majority of the jurors gave evidence of the fact which vitiated the verdict; and in *Price's ex'rs. vs. Fuqua's ex'rs.*, (c) the evidence of two jurors was rejected. The reason is as strong in writs of *ad quod damnum*, as in other cases. As to the case of *Anderson vs. Fox*, there were other circumstances to corroborate the testimony of the jury-men.

January 28.—The court affirmed the decision of the superior court.

(a) 2 H. & M. 249, and judge Roane's opinion ib. 263.

(b) 1 Wash. 79.

(c) 1 H. & M. 385. 3 Bos. & Pull. 326.

1823.
February.



Kinney's executors against McClure.

The act of limitations is a good plea to a suit in equity, brought to recover money collected by an attorney for the plaintiff, and not accounted for by him.

This was an appeal from the Staunton chancery court. Many points were made in the argument; but, as the court only decided *one* point, viz.: the propriety of the plea of the act of limitations, this report will be confined to that part of the subject.

McClure, as surviving partner of Hart, Miller, &c. filed a bill against Ann Kinney, &c. executors of Jacob Kinney, deceased, and the devisees of the real estate, to recover a sum of money which the complainants had put into the hands of the said Jacob Kinney, as an attorney, to collect; and which, they alleged, he had collected, and failed to pay over to the complainants. The bill prays, that the real estate may be subjected to the payment of the debt, in the event that the personal estate should not be sufficient.

Two receipts are exhibited, signed by Jacob Kinney, and dated in 1802, in these words: "Received Jacob Swoope's assumpsit for 35*l.* 15*s.* 5*d.* in part of this "execution;" and the other: "Received Jacob Swoope's "assumpsit for the within sum of 289*l.* 4*s.* 7*d.* in full of "the within execution."

The executors disclaim all personal knowledge of the transaction stated in the bill, but admit the hand-writing of Jacob Kinney, in the receipt above mentioned. They contend, however, that the money ought to be presumed to have been paid, as it was improbable that their testator should have retained so large a sum of money, from 1802 until 1812, (the time of the testator's death.) They also plead the act of limitations.

The cause was sent to a commissioner, to ascertain the amount of the plaintiff's claim, who reported *322l. 5s. 9d.* to be due.

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The deposition of Jacob Swoope stated, that he, being indebted to Kinnerly, (the person against whom McClure & Co. had obtained judgment, by Jacob Kinney, their attorney,) he agreed with Jacob Kinney, as agent of McClure & Co. to pay about \$ 1000 on account of Kinnerly, and in part satisfaction of the judgment which McClure, Brydie & Co. had obtained against the said Kinnerly; that Kinney knowing the affairs of Kinnerly to be desperate, agreed to take the said Swoope's notes, payable in four and five years, without interest; that the said notes were paid when due, &c.

James Bullock deposed, that, in the year 1810, he was requested by William Brown, of the firm of William Brown & Co. to examine in the clerk's office of Augusta county, and see what had been done with the bonds executed by Reuben and William Kinnerly, to McClure, Brydie & Co., Brydie, Brown & Co., or Miller, Hart & Co.; and, if possible, to get the money for those claims, given to Jacob Kinney to collect, as an attorney, many years previous: that, upon examination, he found two or three of the executions returned satisfied, or nearly so, by Kinney himself, (as well as he recollects,) as far back as 1802: that he saw Jacob Kinney on the same day, and told him of the return made upon the executions, and demanded payment: that Kinney shewed the deponent his brother Chesley Kinney's bonds, (which he had taken on account of the said debts,) and offered to deliver them to the deponent in discharge of the said claims: that the deponent refused to accept them, but said he would take, in discharge thereof, bonds of responsible men: that, to this, Kinney made no reply, and left the deponent abruptly: that, upon seeing Kinney again, he told the deponent that if his brother did not discharge the bonds at a very early period, he would; and that he would write to Mr.

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Brown upon the subject: that the deponent met Kinney some time afterwards in Charlottesville, and mentioned the subject of those debts again; he replied they were not collected, but would be very soon; and that he had written to Mr. Brown, apprising him of the transfer, and that he would pay the debt himself, if the money was not paid by his brother very shortly.

Accounts were made up by the commissioner of the administration of the personal estate, and of the value of the real estate.

The chancellor decreed, that the complainant should recover of the defendants the sum of *322l. 5s. 9d.* with interest from the 27th of March, 1802; and as it appears that the executors have disbursed all the personal estate of their testator, &c., and the court being of opinion, that the real estate of the testator is subjected, by his will, to the payment of the monies aforesaid; it is therefore decreed, that unless the defendants pay to the complainant the said sum of money, on or before the 1st day of February next, so much of the real estate shall be sold, as will be sufficient to discharge the said debt, &c.

From this decree, the defendants appealed.

Johnson, for the appellants.

Call, for the appellee.

It was said by the appellants' counsel, that this claim was barred by the act of limitations, unless the assumpsit to James Bullock, took the case out of its operation. He contended, that the testimony of Bullock did not apply to this claim; and, therefore, the act was left in full operation.

The counsel for the appellee answered, that Jacob Kinney was a *trustee* for the clients, whose money he had collected, and therefore the act of limitations would not apply to the case.

To this it was replied, that an attorney did not come under the description of a *trustee*, within the meaning of the rule. The situation of attorneys would be truly perilous, if the act of limitations did not apply to them. They and their posterity, might be made to account, at any distance of time, for all the monies collected during their lives, when all the evidences of payment may have been lost. An attorney cannot be considered as a *trustee*, because the proper action against them, is an *action on the case*, or a *motion* under the act of Assembly, and not a bill in equity to enforce the trust. A *sheriff* is not protected by the act, only because the debt is proved by record, or covered by his bond of office. An *executor* too is a trustee, because he has the legal estate, and the legatee must bring a suit in *equity*. These cases are wholly different from that of an attorney. The testimony of Bullock, does not apply to the case before the court.

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February 5.—Judge BROOKE, delivered the opinion of the court.

The court is of opinion, that the evidence in the record, is not sufficient to repel the plea of the acts of limitations. The decree is, therefore, reversed, and the bill dismissed.

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A testator by his will, dated in 1794, devises a tract of land to his son C, "*and his lawful issue living, as shall be more fully described in a further clause of this will.*" He then devises other parcels of land to his other children, and always adds, *to their lawful issue living.* In a subsequent clause, he says, "*therefore each of the dividends and lot as aforesaid, shall and may be held and possessed by each of my children respectively, or their lawful issues living, (as being now more particularly expressed,) but in case either of my said sons or daughters, shall sell the whole or any part thereof or grant a lease for a certain number of years, or give mortgage on the whole or any part thereof, in such case that dividend or lot shall be forfeited, and be equally divided amongst all the other of my children, if they should be living, or die without leaving such issue, at the time of their death, in either case, let the survivor or survivors, inherit such part : Provided, they hold the same conditionally, not to sell, lease for a certain term, or mortgage as aforesaid ; and when all my children and their issue may become extinct, then to my wife N, and her heirs for ever.*" Held, that C, took an *estate tail*, which was converted into a *fee simple* by the law.

This was an action of ejectment brought in the superior court of Northampton, by William Kendall, and Sarah C. B. Rogers, for one messuage, one garden, one orchard, and three hundred acres of wood land. The declaration was served on Oldham and Cobb, tenants in possession ; and, afterwards, William Littleton Eyre, an infant, by John Eyre, (who was appointed his guardian, *ad litem*.) was admitted defendant to this suit.

At the trial, the jury found a special verdict, setting forth, in substance, the following facts :

That William Kendall, the elder, was seised in his lifetime, and at the time of his death, of a plantation and tract of land, supposed to contain six hundred and ten acres, situated on Cherrystone creek, in the county of Northampton :

That the said William Kendall, the elder, on the 11th day of September, 1794, duly made and published his last will in writing, which contained, among other things, the following devises :

“*Imprimis* : I order and direct that 300 acres of land
 “ fronting on the river, so as including the dwelling
 “ house, yard, garden, and the adjacent fruit trees, to be
 “ laid off by lines running eastwardly and westwardly,
 “ through the middle and most beautiful part of my said
 “ plantation, be allotted to my son *Custis Kendall*, and his
 “ lawful issue living, as shall be more fully described in a
 “ further clause of this will. *Item* : The next 200 acres,
 “ lying back of *Custis’s*, and to the northward of him,
 “ also to be laid off by a line running eastwardly and
 “ westwardly, be allotted to my son *Thomas Preson Ken-*
 “ *dall*, and to descend to him and to his lawful issue living,
 “ as shall be more fully expressed hereafter. *Item* : 100
 “ acres, running as before described, and lying to the
 “ southward of *Custis’s*, as intended for my son *William*
 “ *Kendall*, and to his lawful issue living ; but, if *Mrs.*
 “ *Kendall* should, at her death, give her small plantation
 “ on *Nusswadox*, to my son *William*, then the said 100
 “ acres must be added to *Custis’s* dividend, which would
 “ make him up, in that case, 400 acres, but to be more ful-
 “ ly expressed in a future clause. *Item* : The last ten
 “ acres still lying to the southward of the above 100 acres,
 “ I mean as a lot, (which I suppose may fall somewhere
 “ about *Little Neck*,) to be equally divided between my
 “ two daughters, *Ann Upshur Kendall*, and *Sarah C. B.*
 “ *Kendall*, and to their lawful issue living, as I shall more
 “ fully explain hereafter,” &c. “ *Item* : As this clause is
 “ the winding up of my sentiments respecting my landed
 “ property, I hope the most favorable construction will
 “ be put upon my words and intention ; therefore, each
 “ of the dividends and lot as aforesaid, shall and may be
 “ held and possessed by each of my children respectively,
 “ or their lawful issues living, (as being now more parti-
 “ cularly expressed,) but in case either of my said sons or
 “ daughters, shall sell the whole or any part thereof, in such
 “ case, that dividend or lot shall be forfeited, and be equally
 “ divided amongst all the other of my children, if they

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“ should be living, or to their lawful issue in case of such
“ parent’s death, and so on to their lawful issue so long as
“ there is a child or grand-child to represent me : or where
“ any of my children may die without lawful issue living,
“ or die without leaving such issue at the time of their death,
“ in either case, let the survivor or survivors inherit such
“ part : provided, they hold the same conditionally, not to
“ sell, lease for a certain term, or mortgage as aforesaid :
“ and where all my children, and their issue, may become
“ extinct, then to my wife, Nancy Kendall, and her heirs
“ for ever :”

That the testator died in 1795, and his will was duly proved and recorded :

That on the 8th day of August, 1797, *Custis Kendall*, together with *Nancy Kendall*, the widow of *William Kendall*, the elder, executed a deed conveying the aforesaid three hundred acres of land, to *William Eyre*, who immediately entered upon, and became seised of, the said 300 acres of land, until his death on the 23d day of December, 1808 :

That the said *William Eyre*, by his will, devised the said 300 acres to his son *William Littleton Eyre*, who entered upon, and became seised of, the said land, by his guardian, and continues seised thereof ; which land is the same that was devised in the will of *William Kendall*, senr. to his son *Custis Kendall* :

That the said *William Kendall*, the elder, left no children living at his death, except those named in his will aforesaid, viz : *Ann Upshur Kendall*, *Thomas Preson Kendall*, *Custis Kendall*, *William Kendall* and *Ann C. B. Rogers* :

That *Ann Upshur* died in 1796, an infant, intestate, and without issue ; *Thomas Preson* died in 1807, without issue, he never having been married ; and *Custis Kendall* died without issue, in January, 1809, he never having been married.

That *William Kendall* and *Sarah C. B. Rogers*, the lessors of the plaintiff, are the only surviving children of the aforesaid *William Kendall*, the elder :

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That *Nancy Kendall*, the widow of *William Kendall*, the elder, died in 1805, she being then the wife of a certain *John Boissard* :

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That *Custis Kendall*, was the eldest son of *William Kendall*, the elder :

That at the death of *William Kendall*, the elder, all his aforesaid children were residing in his family, and were all under the age of twenty-one years, except *Custis* :

That after the death of *William Kendall*, the elder, no partition was made of his said lands, until July, 1797, when a partition was made at the request of said *Custis Kendall*, by the surveyor of the county of Northampton, by which the lands in the declaration mentioned, were allotted to the said *Custis Kendall*, who by virtue thereof entered, and was seised of the same, until the execution of the aforesaid deed to *William Eyre*, by the said *Custis Kendall*, and his mother *Nancy Kendall*.

Upon these facts, the jury submit the questions of law to the court.

The superior court gave judgment for the defendant, and the plaintiffs appealed to this court.

William Hay, Junr. for the appellant.

It is apparent from the face of the will, that the testator intended his children should take *life estates* only, with contingent remainders in fee to their issue *living at the time of their deaths*, and in the event that any of them should die without such issue, with cross remainders amongst the survivors. That is a good limitation by way of contingency with a double aspect.

The first difficulty to be encountered in supporting this construction is, that life estates are not *expressly* given. But this circumstance is immaterial, if it is manifest that the issue were intended to take as purchasers.

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As estates *expressly* given for life, shall be *enlarged* to estates of inheritance, when it is necessary to effectuate a *general intention* in favor of the issue, which would otherwise be defeated; so estates in the first instance indefinitely limited, or limited in terms importing estates of inheritance, shall be *reduced* to life estates, when it is manifest from the subsequent words, that the testator intended the issue to take as purchasers. In *Low vs. Davis*,^(a) and *Doe vs. Lammings*,^(b) estates tail were expressly given in the first instance; but the subsequent words plainly shewing that the issue were intended to take as purchasers, they were held to be only life estates. Nothing can be more manifest than that the testator, in this case, intended his son *Custis*, and his other children, to take *life estates* only, in the land allotted to them.

1. There is a restriction upon the power of alienation, applying in terms to *his children* only, and not to their *issue*, indicating that the children were to take limited estates, but that estates of inheritance were to commence in their issue.

It may perhaps be said, although it is inconsistent with a *fee simple* estate in the children, it is perfectly consistent with an *estate tail*. But this is not a just inference; for in that case, it should have extended to the issue, which it does not.

2. The issue were plainly intended to take in remainder, and not through the parent. The limitation is to *Custis or his lawful issue* living. For, although in the first part of the will, it is to *Custis and his lawful issue* living, yet the testator has, in that clause, referred to a subsequent one, as more fully explaining his intention, in which the limitation is as stated above.

The word *or* is used *disjunctively*, making not one, but successive limitations of the same estate, and plainly shewing that the issue were intended to take *after*, and not *through*, the parent. And if so, the reasoning in

(a) 2 Ld. Raymond, 1561.

(b) 2 Burr, 1100.

Wilde's case, (c) applies with force. In this respect, this case differs from the *University of Oxford vs. Clayton*, (d) in which Lord Northington determined, that by a devise to A, and the issue of his body living at the time of his death, and for want of such issue to B, A took an *estate tail*, because it appeared from the will, that the issue were intended to take by descent, and not in remainder. In addition to which it may be remarked, that words of limitation were wanting, which are not necessary here, and that the decision has met with the disapprobation of the profession. (e)

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3. The limitation in this case is not to issue *indefinitely*, but to issue *living at the time of the death*, which qualification shews, that the testator used the term *issue* as a special *designatio personæ*. That *issue living at the death*, is what the testator meant by the term *issue living*, is manifest, because he has so expressed it in the principal clause; and although there is much perplexity in the clause, it is impossible to give any other sensible construction to his words. If he did not mean *issue living at the death*, and did not mean to take in the *issue indefinitely*, (which is manifest,) then, living when? or how long? No answer can be given but the first; *living at the death*.

4. The limitation over is amongst the *survivors* of his children; which circumstance is conclusive, that he did not intend an indefinite failure of issue.

If the foregoing views be correct, the limitation to *Custis*, however it may have been expressed, is equivalent to an estate to him for life; remainder to his issue living at the time of his death; if none, such remainder to the survivors of the children of the testator. If so, the case of *Warner vs. Mason*, (f) is an express authority. It is, in fact, less strong than this case. There was some ground for contending in that case, that the limitation, by way of

(c) Co. Rep. 17.
(d) Ambler 385. 1 Eden, 473.

(e) 2 Powell's Fearn, 198.
(f) 5 Munf. 242.

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contingent remainder, was too remote, and that the life estate must fall before the remainder could vest. Not so here; for the limitation over in this case, being upon a failure of issue living at the death, must take effect *eo instanti* that the life estate determines.

There are two other clauses in this will, which it may be necessary to notice. The first is, that in which, when providing for a forfeiture by alienation, he directs the forfeited parts to be divided amongst his surviving children, if they should be living, or to their lawful issue, in case of such parent's death, and so on to their lawful issue, so long as there is a child or grand-child to represent him.

It may be said, that this clause affords an evidence of his intention to prevent the estate from being alienable, so long as there was a child or grand-child to represent him, and if so, to give an estate tail.

But this is not the just construction. He intended merely to provide, that in the event of a forfeiture by any of his *children*, to whom alone the restriction is extended; that the issue of a deceased child should, in the division of that part, represent the parent; not that a grand-child should not have the power of alienation as to that part of his estate, which had devolved upon him, after the death of his parent.

The other clause is, that in which he limits the estate to his wife, where all his children and *their issue* may become extinct; and it is the only one which affords any evidence of his intention to give an estate tail to his children, and cannot be permitted to outweigh the indications of a contrary intention, afforded by every other part of the will. The court will rather construe it to mean, a limitation to the wife, upon the failure of *such issue*, as is intended by the preceding clause, the precedents for which construction are numerous.

Besides, cross-remainders had before been *expressly* limited amongst his children, and the court, in such case, will never *imply* them, which it must do, if this clause is

held to enlarge the estates of the children to estates tail. (g)

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Wickham, R. Taylor, and Upshur, for the appellee.

A preliminary objection was made by the appellee's counsel, that the plaintiffs in ejectment had misconceived their action, as they had not a right of entry. The necessity of such a right is an undisputed principle; and, if questioned, can easily be established by a multitude of authorities. The right of entry was *tolled* in this case, by the death of William Eyre, and the transmission of the estate by devise, to Littleton Eyre, the present defendant. It may be objected that the right of the appellants did not accrue until the death of Custis Kendall. To this it may be answered, that if Custis Kendall would have been barred, the appellants, who are remainder-men, must be equally barred. The appellants are reduced to this dilemma. If the estate of Custis Kendall was a fee-tail, (as we say,) the right of the appellants is barred, both by the descent cast, and by the statute converting it into a fee-simple. If, as the appellants contend, the estate of Custis was a *life estate*, then the condition against alienation was good, the estate became forfeited by the conveyance in 1797, the right of action vested in them at *that* time, and the right of entry is *tolled*, as well by the length of time, as by the descent cast. So that, *quacunqve via*, the appellants could not maintain an ejectment.

Upon the merits. It is evident, from a minute scrutiny of every part of this will, that the testator intended to create an estate, which the law would not permit. He designed to annex conditions, which should attend the estate indefinitely, and for this purpose has used words, which, according to long established principles, can only create an estate tail.

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That *Custis Kendall* took an estate tail, results from the devise to him and *his lawful issue living*. If the word *living* be omitted, there could be no doubt on the subject. What effect then has the addition of that word? *Living* has relation to a particular *state* or *condition*, and not to any particular *time*. It is merely the antithesis to *dead*. But suppose it relates to a particular *time*. To what time? The date of the will? Surely not; for *Custis Kendall* had never been married. Did it relate to the death of *Custis Kendall*? This construction is disproved by the subsequent clause, which, the testator himself says, is explanatory of all the rest, "*or where any of my children die without lawful issue living, or die without leaving such issue at the time of their death, in either case,*" &c. In this clause, he provides both for the event of his children dying without issue living *at the time of their death*, and for the event of their dying without issue, *indefinitely*. Did it refer to the death of the *testator*? The clause last quoted is equally fatal to this supposition, as one member of it speaks explicitly of his children dying without leaving issue, at the time of *their* death. If they are purchasers, (as the appellant contends,) and the devise applies to the death of the *testator*, *Custis* and his children would take as *tenants in common*; which would be as little conformable to the wishes of the appellant, as to the evident intention of the testator.

The only remaining supposition is, that the testator intended an *indefinite failure of issue*.

Again. The devise to his wife, after all his children and *their issue* may become extinct, affords another proof that the testator meant an *indefinite failure* of issue. For, if his children should die, leaving issue, and that issue should die, leaving the wife, it can hardly be supposed that he intended to deprive his wife of the enjoyment of the estate. In such an event, the testator would have produced a partial *intestacy*, which he certainly did not intend.

The restriction on alienation is a further proof that the testator intended to give an estate which would be *alienable*, without that restriction. Otherwise, the restriction was wholly nugatory.

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An executory devise cannot be attached to an estate-tail. *(h)* The case of *Porter vs. Bradley*, *(i)* does not militate against this doctrine, as that was in fact a fee-simple converted into a fee-tail by *implication*, and the court merely decide that the implication should not be raised, because it would defeat the remainder; and considering the limitation over as a contingent remainder, it cannot take effect under the authority of *Carter vs. Tyler*. *(j)* In *Warner vs. Mason*, *(k)* there was an express *life-estate*, and other circumstances going to shew the intention of the testator to restrain the limitation over within the proper limits. On the other hand, the case of *Sydnor vs. Sydnors*, *(l)* is a strong authority in our favour. *Custis Kendall*, therefore, took an estate-tail, which was converted by the statute into a *fee-simple*.

Leigh, in reply.

1. As to the objection to the *remedy* by ejectment. I admit that a right of entry is essential to an ejectment, and that the action cannot be maintained, if that right is taken away by any means whatever. It is said that this effect was produced, by the conveyance of *Custis Kendall* to *William Eyre*, in the year 1797. But the act of assembly *(m)* is decisive on this subject; which declares that no conveyance shall operate to pass more than the estate of the grantor. *Eyre*, therefore, only took an estate for the life of the grantor *C. Kendall*.

Such being the nature and quantity of estate held by *Eyre*, did he die so seised, and was such descent cast as *toll*ed the entry of the remainder-man?

(h) 2 Fonb. 100. 2 Fearn, 52.

(i) 3 Term Rep. 143.

(j) 1 Call, 165.

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(k) 5 Munf. 242.

(l) 2 Munf. 263.

(m) 1 Rev. Code, (of 1819) c. 99, § 20.

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We have the authority of *Coke Littleton*,⁽ⁿ⁾ for saying, that no descent tolls an entry, unless the ancestor dies seised of a *fee-simple*, or *fee-tail* and *freehold*.

But in truth, there was no *descent* in this case. The appellee was in by *devise*, which was the act of the party. The reason why a descent tolls an entry is, that the heir is in by act of law.^(o) *Eyre*, therefore, was neither the *disseizor* of the tenant for life, or of the remainder-man. Not of the tenant for life; for he was in by his conveyance. Not of the remainder-man; because, by force of the act of assembly, he took no estate which interfered with his rights. Nor was *Littleton Eyre* a *disseizor*. He only took what his testator had to give, viz: the estate *pur autre vie*. But that neither made him a *disseizor*, intruder or *disseizor*; but only a *tenant at sufferance*.^(p)

At the time of the supposed descent cast, the right of entry had not accrued; for *William Eyre* died in 1808, and *Custis Kendall*, in 1809. The right of entry, therefore, could not be *toll*ed. An executory devise is not affected even by fine and recovery.

2. As to the merits. The limitation under which the appellants claim, is either in its nature an *executory devise*, limited on a previous fee, given to *Custis Kendall*; or a *contingent remainder* to the appellants, limited on a life-estate devised to *C. Kendall*.

The frequent reference in the will to the explanatory clause, imperiously directs us to look there for the testator's true intent and meaning. The words "*as now more particularly expressed*," do not refer exclusively to the restriction on alienation, but to the previous limitations. The expression "shall be held and possessed by each of my children *respectively*, or *their lawful issue living*, &c." is applicable to all the preceding limita-

(n) § 387, 388.

(o) Litt. § 385.

(p) 3 Black. Com. 173. 2 do. 150. Fitzh. N. B. 201. Finch, 263. Co. Litt. 57. b. n. 2.

tions, and is a provision for the event of any of the devisees dying in the testator's life, leaving issue, to prevent the estate from *lapsing*. The effect of this construction will be, not to make the issue take by succession from their parents, nor as purchasers of the remainder after them; but by substitution in *place* of them. The limitation to the children *or their issue living*, gives a fee-simple to the children, if they survive the testator; and if they die before him, *leaving issue*, it gives the same estate to the issue living.

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If *C. Kendall* took a fee-simple, the limitation over is clearly good as an executory devise. This construction obviates the argument drawn from the prohibition of alienation, and is perfectly reconcilable with the argument that the prohibition is confined only to the *children*. If the issue took, they were to have a fee; if the remainder-men took, it was intended to restrain their alienation also.

If this construction is wrong, that of *Mr. Hay* is right.

Upon these constructions, the testator will die *testate* as to all his estate. Every event will be as well provided for, as if *C. Kendall* took an estate tail. It will be good as a contingent remainder limited on *C. Kendall's* life estate; or it will be equally good as an executory devise, if the remainder is so limited, that in the nature of things it could not vest, at the termination of the particular estate.

February 6.—Judge BROOKE, delivered the opinion of the court.*

The court is of opinion, that *Custis Kendall*, under whom the appellee claims, took an estate tail in the land in question, under the will of *William Kendall* the elder, which was converted into a fee by the law, and therefore, affirm the judgment.

* Judge Green did not sit in this case, the cause having been argued before his appointment.

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Williams against Donaghe's executor. . .

In equity it is competent for a creditor to prove that his claim was due from a partnership, although he may have taken a note from one of the partners, in his individual name.

A suit in equity may be maintained against a partnership, if one of the partners resides out of the state, although the remedy would have been at law, if they had both been residents of this state.

Where an exception to a commissioner's report is correctly sustained by the court, upon the evidence produced, yet if there is good reason to believe that other evidence might be produced, to give the case a different result, and that such evidence has been withheld, in consequence of the commissioner's having allowed the item, the court of chancery ought not to pronounce a final decree, but to recommit the account for farther evidence and enquiry.

Hugh Donaghe brought a suit in the Staunton chancery court, against Joseph and Cumberland D. Williams, to recover the amount of a note, executed by the said Joseph Williams, to the said Donaghe, for \$ 2,169 58 cts.

The bill sets forth the following case ; that the plaintiff having a waggon and team, in the year 1807, some other horses, and a quantity of grain and bacon for sale, he made a contract with the said Joseph Williams, (then part owner and manager, as he understood, of certain iron works in the county of Augusta, conducted under the name and firm of Joseph and Cumberland D. Williams,) for the sale and delivery thereof, to the amount of \$ 2,169 58 cts. : that he made this contract under the assurance, that he was dealing with the *firm*, and that both partners were liable for the said debt : that he accordingly delivered, in the course of the year, the produce and property to the amount above specified, *on the responsibility of the said firm* : that he understood that the active partner Joseph Williams, was fully authorised to transact all business for the said firm : that it will appear by various orders, for different parcels of the said produce, that this business

was transacted in the name and under the faith of the co-partnery aforesaid : that when the same was all delivered, the said Joseph Williams executed his note to the plaintiff for the amount, payable twelve months after date : that the debt aforesaid, has never been paid : that he is informed, that the said Joseph Williams is about to leave the state, without paying, or in any manner securing the said debt : that Cumberland D. Williams can only be subjected by a suit in equity, as the note was executed by Joseph Williams alone : that Cumberland D. Williams resides in Baltimore, is a man of wealth, and owns large possessions in Augusta, as a partner of the said firm. The plaintiff therefore prays, that a writ of *ne exeat* may issue against Joseph Williams ; that the court may decree payment of the said debt, from the said co-partnery, and hold the property, real and personal, of the co-partnery, responsible to the final decree, unless the absent partner gives ample security, to abide by such decree, &c.

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Cumberland D. Williams demurred to the bill, because the plaintiff, by his own shewing, had a complete remedy at law. He, also, filed an answer, stating, that he and Joseph Williams, in the year 1806, became jointly interested in the iron works mentioned in the bill, and continued so during the year 1807 ; but that during all that period and ever since, the said Joseph Williams was never authorised, to contract debts, or make engagements on the joint or several account of this respondent, and that he was not so authorised in the transaction alluded to by the complainant : that by the books of accounts of *Mount Torry* furnace, and *Belvidere Forge*, (in which establishment the respondent was interested,) the complainant is credited at the former, for certain articles furnished, viz : certain horses and grain, during the year 1807, amounting to the sum of \$ 686, and by the books and accounts of said forge, he is credited for grain to the amount of \$ 186, furnished in 1807 : that the complainant agreed, on or about the 20th of August, 1808, with the respondent, to

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receive and purchase of the latter, ten tons of bar iron, at the rate of \$ 100 per ton, deliverable at *Betvidere Forge*; that the respondent has heard, and verily believes, that nine tons and a half were delivered accordingly to the complainant, and was received by him; and that the remaining half ton, was ready for delivery at the time and place agreed; amounting to \$ 1000, which is due to this respondent alone: that he is willing that the said two sums of \$ 686, and \$ 186, amounting to \$ 872, shall be deducted, leaving a balance due the respondent of \$ 128: that the respondent does not believe that the complainant relied on the faith or credit of the respondent, as the business was not carried on in the name of Joseph and Cumberland D. Williams, and as the complainant received in liquidation of the said debt, the note of the said Joseph Williams alone, in his individual character, and not in the name of the partnership: that the said Joseph, carried on a separate establishment, called *Union Forge*, in which the respondent had no manner of concern: that the respondent never made any promises, as stated in the bill, to pay any part of the money, except so far as is admitted to be due in this answer.

Joseph Williams answered, that it is true that he entered into a contract with the complainant, by which he became indebted to him in the sum stated in his bill: that this contract was in part for the benefit of Joseph and Cumberland D. Williams, and in part for the benefit of the respondent alone; that is to say, about \$ 1200 of the debt contracted, was for the benefit of the firm, and the balance of \$ 969 58 cents, for the benefit of the respondent: that since he executed his note to the complainant, the latter entered into a verbal agreement with the respondent, to receive from him ten tons of iron; to be delivered at the forge of *Joseph and Cumberland D. Williams*, on the *South river*, at \$ 100 per ton, in part discharge of the claim he now sets up: that, at the time of the said contract, the respondent understood from the

complainant, that he had entered into some negotiation with *Henderson & Robinson*, by which they were to get the ten tons of iron; and the complainant requested the respondent to write to the said *Henderson & Robinson*, and inform them at what time they might expect to receive it: that the respondent accordingly wrote, and the said *Henderson & Robinson* actually received two tons of the said iron: that he had two other tons ready to be delivered to the said *Henderson & Robinson*, on the same account; but he was prevented by the complainant, who sent a message to the respondent, to request that he would not deliver any more iron to them, but that he would pay for what they had already received: that the respondent has always been ready to deliver the said ten tons of iron to the complainant, and trusts that he will still be compelled to receive it: that the respondent has been informed, and believes, that the complainant entered into an agreement with *Cumberland D. Williams*, for ten tons of iron more, at the same price, as he believes; which will only leave a balance due to the complainant of \$ 169 58 cts. which the respondent has been at all times willing to discharge, if the complainant had complied with his several agreements aforesaid: that the complainant had no ground to require him to give security to abide by and perform the decree, as he could have no reason to suspect him of an intention to remove out of the state of Virginia.

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Depositions were taken, and exhibits filed, to prove that the articles were furnished on account of the partnership, and to explain the transaction relative to *Henderson & Robinson*.

The cause was referred to a commissioner to state an account of the goods which were purchased by the defendant, *Joseph Williams*, on his own account, and those furnished on account of the partnership, &c.

The commissioner reported a balance of \$ 38 53 cts. in favor of *Joseph and Cumberland D. Williams*; and a balance of \$ 1167 19½ cts. against *Joseph Williams*, indi-

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vidually. In making up this account, the commissioner allowed a credit to *Joseph Williams*, for ten tons of iron, delivered to the order of *Henderson & Robinson*; and he charged the amount of the note of \$2,169 58 cts. to *Joseph Williams*, alone.

The plaintiff filed exceptions to the report; two of which were, that the note above-mentioned should have been charged to *Cumberland D. Williams* and *Joseph Williams*, jointly; as it appeared that the articles for which it was given were purchased in the name of the said firm, on their credit, and for their use; and that nine and a half tons of iron were credited to the said firm, when there is no evidence to support this credit; and if there was evidence to support it, the iron was delivered while *Joseph Williams* was tenant of *Belvidere Forge*; and if the accounts are to be separated, this credit ought to be given to *Joseph Williams*.

The chancellor sustained the two exceptions above mentioned, and decreed the sum of \$1167 19½ cts. against the defendants, with interest, &c.; and *Cumberland D. Williams* appealed.

Nicholas, and *Wickham*, for the appellant.

Leigh, for the appellee.

February 10.—Judge CABELL, delivered the opinion of the court.

The evidence abundantly proves, that the debt which was the consideration of the note in the bill mentioned, was contracted with *Hugh Donaghe* by *Joseph Williams*, one of the partners of the firm of *Joseph & Cumberland D. Williams*, on the credit, and for the benefit of the firm. It did not cease to be a debt of the firm, by the said *Joseph Williams* giving his individual note therefor; nor by his applying, to his individual use, some of the property

for which the debt was contracted. Being a debt due from the partnership, and one of the partners residing out of this commonwealth, the suit was properly brought in chancery ; and the demurrer was, therefore, correctly overruled. The court is farther of opinion, that all the exceptions to the commissioner's report that were sustained by the chancellor, were correctly sustained. But although there is no sufficient evidence in the record to shew that the 9½ tons of iron, the subject of the 3d exception, were delivered by the appellants to the testator of the appellee ; and although in consequence of the absence of such testimony, that exception was correctly sustained ; yet, as there is strong reason to believe from the deposition of Cahill, and the answers of the defendants, that the said iron, or a part thereof, was delivered to the said Donaghe, or his order ; and as the commissioners having allowed a credit therefor on the evidence exhibited, may have prevented the appellants from producing other evidence, in their power, on that subject; the court is farther of opinion, that under these circumstances, the chancellor erred in pronouncing a final decree ; and that he ought to have recommitted the account to a commissioner for farther evidence and enquiry, whether any, and if any, how much iron was delivered to Donaghe, or his order, in pursuance of the agreement evidenced by the letters of the 23d and 24th of August, 1808. The decree, on this ground only, is reversed, and the cause is remanded for farther proceedings, &c.

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Where a conveyance of real estate is made to a creditor, in trust to satisfy his own demand, such conveyance is not to be considered as a *deed of trust*, but as a *mortgage*, to which the right of redemption is incident.

But if a sale is made by the creditor, under these circumstances, and the grantor comes into a court of equity for relief, the court will not decree in his favor, unless he makes the purchaser under the sale, a party.

This was a suit brought in the Williamsburg chancery court, and afterwards removed to the Fredericksburg district.

William Chowning, filed his bill against Peter P. Cox and Elizabeth Thompson, stating the following case: that on the 18th day of November, 1803, an agreement was made between the complainant, and the said *Elizabeth Thompson*, by which the latter agreed to sell and convey to the complainant, a tract of land in the county of Westmoreland, called *Laurel Grove*, in consideration that the complainant would pay certain debts due from the said *Elizabeth Thompson*, set forth in the agreement, together with a sum of money to herself, making in the whole, 876*l.*: that one of the debts to be paid by the complainant, was due to Peter P. Cox, and secured by a deed from the said *Elizabeth* to the said *Peter*, dated the 8th of August, 1801, conveying the same tract of land, and stating the consideration to be \$ 1,500; with a condition that the said *Peter* should hold the said land in trust, to secure the payment of the said sum, with interest: that at the time of entering into the agreement aforesaid, the complainant understood that there was a mortgage on the said land to the said Cox, and nothing more: that the complainant made several payments under his agreement, was put into possession of the land, and was preparing, by great exertion, to pay the purchase money, and exonerate the land

from this incumbrance, when in 1806, after he had paid the said Cox, the sum of 300*l.* 8*s.* in part of his debt, he was informed that the title to the said land, was doubtful : that in consequence of this information, the complainant filed a bill of injunction against *Cox* and *Thompson*, and one who, as the complainant was informed, claimed title to some part of the said tract of land : that the injunction was granted, and afterwards dissolved : that immediately after the dissolution of the injunction, the said Peter P. Cox undertook to sell the said land, without giving any warning to the complainant, or requiring payment of the balance due, and the said land was put up to public sale, and bought by a certain ; whether on his own account or that of the said *Cox*, the complainant did not know : that the deed to *Cox*, can only be considered as a mortgage, because there is no particular person named as trustee, who might act impartially between the debtor and creditor : that the trust is uncertain and equivocal, as there is no covenant on the part of *Cox*, to receive payment from the grantor, and to release her, or re-convey the land : that if the deed is a mortgage, the proceedings of the said *Cox*, are illegal and improper : that he knew of the agreement between the complainant and *Elizabeth Thompson*, and had received from him two payments under that agreement : that *Cox* has caused the whole tract to be sold to pay the balance due ; and threatens to bring an ejectment against the complainant. He, therefore, prays that the said *Cox*, and *Elizabeth Thompson*, may be made defendants : that he may be permitted to redeem upon paying the principal and interest due to the said *Cox* ; and that the latter may be compelled to release all his claim to the said land, &c.

The defendant *Cox* answered, that the \$ 1,500 lent to the said *Elizabeth Thompson*, were not his own, but the money of his wards, the children of his brother ; to secure the payment of which, the deed of trust mentioned in the bill was executed : that he advertised the said land

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for sale, in pursuance of the deed of trust ; but the sale was enjoined at the suit of the complainant, under pretence that the said *Elizabeth Thompson's* title to the said land was defective : that the injunction was afterwards dissolved, and the land again advertised for sale on the premises : that the complainant and many others attended ; when the complainant, before the sale commenced, asked the respondent if he would receive from him eleven or twelve hundred dollars, and give a longer time for payment of the balance : that the respondent, induced by the distress of the complainant's family, agreed, that if the said sum was paid in one hour, he would give a longer time for the balance : that the respondent waited at least three hours, and did not commence the sale, until he was informed by the complainant, that he had been disappointed in obtaining the money : that the sale was then commenced, and several persons made bids for the land, but no one on account of the respondent : that the land was purchased by Mr. *William Taylor* for 626*l.* for himself, and not for the respondent ; who offered to let the complainant have it, if he would pay the sum he had bid for it in eight or ten days : that the said deed was always treated by the complainant and *Elizabeth Thompson*, as a deed of trust, and not a mortgage : that the respondent admits, that he has received from the complainant, the sum of 300*l.* 8*s.* in part of the sum due, which, with interest, leaves a balance due to this respondent's wards, of 272*l.* 13*s.* 8*d.* : that as to the title of the said *Elizabeth* to the said land, he believes it to be unimpeachable, &c.

The answer of *Elizabeth Thompson*, confirms the answer of *Cox* as to the consideration of the deed of trust : that she considered it as a deed of trust, and not a mortgage : that the complainant, in his treaty with her for the purchase of the said land, urged a reduction in the price, because the said *Cox* might, at very short notice, sell the land : that her title is undeniable : that since the sale, the said *Cox* as trustee, has paid the respondent \$ 400,

for which sum the complainant shall have credit in his contract for the sale of the land to him, and the balance, if any, she will pay to him, on his producing evidence that he has paid or secured the payment, to *Forbes and Whitlock*, according to his agreement with her; but if the deed aforesaid shall be considered a mortgage and not a deed of trust, she hopes that she may be paid the amount due to her by the agreement, and that the debt to *Forbes and Whitlock*, may be also paid.

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The chancellor referred the accounts between the parties to a commissioner, to ascertain the balance remaining unpaid in the hands of the defendant *Cox*, of the sales of the land in the bill mentioned, and the amount due from the plaintiff to the defendant *Thompson, &c.*

The commissioner reported a balance unpaid in the hands of *Cox*, of 253*l.* 16*s.* 3*d.*; and that *William Chowning* was indebted to *Elizabeth Thompson*, in the sum of 166*l.* 3*s.* 9*d.*

The chancellor decreed, that the complainant's bill should be dismissed as to so much thereof, as seeks to be relieved against the said sale: that he and his heirs, should be forever barred of all title in the said land; and that the defendant *Cox*, after reserving out of the sale of the said land, the amount reported by the commissioner to be due to him, do pay to the defendant *Thompson*, the sum of 120*l.* with interest thereon from the first day of January, 1804, until paid; and that he do pay to the plaintiff the sum of 253*l.* 16*s.* 3*d.* with interest from the 29th day of May, 1812, until paid, &c.

From this decree, *William Chowning* appealed.

Wickham, for the appellant.

Leigh, for the appellee.

For the appellant, it was contended: 1. That the deed was in fact a mortgage, and that a creditor could not be a

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trustee for his own benefit. 2. That *Cox* was not authorised by the terms of the deed, nor by the principles of equity, to sell more land than was necessary to pay the debt due from Elizabeth Thompson to him. The cases of *Davidson vs. Wait*, (a) and *Turner vs. Turner*, (b) were referred to, as analogous to the present case.

The counsel for the appellee replied, that *Cox* proceeded to sell the land with the perfect knowledge of Chowning, and without objection on his part: that as to *Cox* being creditor and trustee, Mrs. Thompson frequently recognized his character as trustee; and it is proved by the deed itself, that he was not the *real* creditor, but that the money borrowed, was that of his wards. But admitting that he was the creditor, there is no principle or authority which forbids the union of the two characters in the same person. No unfairness in the sale is proved or even alleged, in the present case. The case of *Moore's ex'r. vs. Aylett's ex'r. &c.* (c) The deed authorised and directed *Cox* to sell the *whole* land.

February 13.—Judge CABELL, delivered the opinion of the court.*

This case presents the general question, whether a deed executed by a debtor conveying land to his creditor, and purporting to constitute him the trustee for selling the land, and applying the proceeds of sale to the payment of the debt due to himself, can be regarded otherwise than as a mere mortgage, to which the right of redemption is incident? or, in other words, whether a creditor thus constituted a trustee, can, by the mere authority derived from the deed, and without resort to a court of equity, sell the lands so as to bar the rights of the debtor, and those claiming under him.

(a) 2 Munf. 527.

(b) 3 Munf. 66-68.

(c) 1 H. & M. 29.

* Judge Brooke absent from indisposition.

Where a third person, disinterested and indifferent between the parties, is constituted the trustee, it cannot now be questioned that he possesses the powers claimed for the creditor in this case. We do not mean to insinuate that the court has gone too far in confirming these powers, and in sanctioning the summary proceedings to which they give rise: but we are of opinion, that it has gone far enough; that it has gone as far as the purposes of convenience and justice require; and that it cannot go farther, without opening a door to fraud and oppression. Although there is no decision which bears, expressly, on the point before us, yet the principles frequently declared in relation to the powers and duties of trustees in general, are utterly incompatible with the due exercise of those powers and duties by the creditor. Some of these principles will be found declared in the case of *Lane vs. Tidbal*.^(d) It is there said, among other things, that a trustee, in a deed of trust, is to be considered as the agent of both parties; and that he ought to act impartially between them, &c. It is surely not necessary, for the purpose now before us, to proceed farther in the enumeration. It must frequently happen, that the time, the place, and the manner of selling, will present questions of serious difficulty, and of great importance to the parties. The sum really due, at the time of sale, may also admit of much controversy. On all these points, as well as many others that might be mentioned, the interests of the parties may be, and frequently are, at direct variance; and to refer them, for adjustment, to the will of one party only, would be contrary to the clearest principles of natural justice. That any man should execute a deed conferring such powers, with a belief that the deed will be obligatory on him, affords another proof of the maxim, that the borrower is a slave to the lender. This is one of those cases in which it becomes necessary to protect men from the effects of their own folly or imprudence.

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(d) Gilmer's Rep. 130.

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We are all, therefore, of opinion, that the deed in the record mentioned, did not give the power to sell the lands, so as to bar the right of redemption.

In pronouncing this opinion, we wish to be understood as confining ourselves to the case before the court, which is a case of real property. How far the same principle may, or may not, be applicable to a case of personal property, we wish to be understood as giving no intimation.

On these principles, if there were no other persons than the debtor and creditor, interested in this controversy, the court would not only reverse the decree, but provide for a sale under the directions of the court of chancery. But the person who purchased under the former sale, and who has the legal title, has not been made a party. Had he been before the court, he might have given a different aspect to the cause. He might have shewn, that although the sale cannot be justified on the sole ground of the powers derived from the deed, yet it ought to be confirmed in his favor, in consequence of the subsequent acts of the appellant. He ought, therefore, to have been a party; and the chancellor erred in pronouncing a final decree, without affording an opportunity to bring him before the court.

It is proper to observe, that if the decree were free from the objection aforesaid, we should still have to reverse it for error against the appellee, Cox. The decree is erroneous, even on the principles on which it professes to proceed. The land sold for 626*l.* There was due to Cox the sum of 372*l.* 3*s.* 9*d.* which he is directed to retain; of course, he ought not to have been subjected to pay more than the balance, viz. 253*l.* 16*s.* 3*d.* Yet he is decreed to pay that balance to the appellant; and the farther sum of 120*l.* to the appellee Thompson, with interest from January, 1804.

The decree is therefore reversed, and the cause remanded for farther proceedings, pursuant to the principles now declared.

Tazewell and others against Smith's administrator.

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When a testator directs his real estate to be sold, and the money arising from such sale to be paid to particular persons, the interest of the legatees is a *vested* one, although the will may give a discretion to the executor, as to the *time* of selling the estate.

The principle will be the same, whether the estate devised to be sold, be an estate in possession, or only a remainder.

The death of the devisee or legatee before the sale, will not defeat the interest, unless there is some provision in the will to that effect. The interest in the proceeds of the sale is as much a vested interest, as if the *land* itself had been immediately and directly devised.

Land directed to be sold is considered as money, unless an election be made to take it as land, by some person having a right to elect.

Under what circumstances the heir at law ought to be made a party.

This was a suit brought in the Richmond chancery court, by Larkin Smith, and Sophia Ann, his wife, against Littleton W. Tazewell, executor of Benjamin Taliaferro, deceased, William McCandlish, and Mary Nelson, his wife, and others, defendants. The case disclosed by the bill, answers and exhibits, was as follows :

Richard Taliaferro, by his will, devised two tracts of land in Brunswick and Dinwiddie, to his wife, Rebecca, during her widowhood ; and at her death or marriage, to *Benjamin* and *Robert Taliaferro*, his sons, equally to be divided between them.

Benjamin Taliaferro intermarried with the complainant, *Sophia Ann*, and died leaving two infant children, Richard Henry and Henry T. Taliaferro, leaving a will, by which he appointed the complainant, *Sophia*, and *Littleton W. Tazewell*, his executors ; the latter of whom alone qualified, and took upon himself the office of executor.

The will of Benjamin Taliaferro, after providing for his widow, the complainant *Sophia*, directs, that all the

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rest and residue of his estate, "of what nature or kind soever, whether in possession, remainder, or reversion," may be sold by his executors, or such of them as shall qualify, "at any time, and in any manner he or they shall think proper. And it is my will and desire, that the money arising from the sale of my property above spoken of (after payment of my just debts,) may be laid out by my executors, or such of them as shall act, in any manner they may think most advisable, so as to produce a certain annual income; and it is my will and desire, that this annual income may be equally divided between my two sons, *Richard Henry* and *Henry Taliaferro*, each and every year, until either of my said sons attains the age of twenty-one years, or marries; at which time, I desire that one moiety of the principal may be assigned and transferred to him, in like manner as the other moiety is given to his brother; but should either of my said sons die before he attains the age of twenty-one, or marries, then it is my will and desire, that the other should succeed to his proportion."

Richard Henry and *Henry Taliaferro*, both died under the age of twenty-one, and unmarried, and during the life of the aforesaid *Rebecca Taliaferro*, the widow of *Richard Taliaferro*, and possessed of the estate in question, under the will of her husband.

Rebecca Taliaferro died shortly before the institution of this suit, without having married a second time, and consequently, without having forfeited the estate, under the will of her husband, *Richard Taliaferro*.

No partition was ever made of the two tracts of land aforesaid, between the said *Benjamin* and his brother *Robert*, or their heirs; nor did *Littleton W. Tazewell*, the executor of *Benjamin Taliaferro*, ever execute the power vested in him by the will of the said *Benjamin*, of selling his estate in the lands aforesaid.

Sophia Ann Taliaferro intermarried with *Larkin Smith*; and contends that she is entitled to all the interest which

the said *Henry* and *Richard Taliaferro* had in the estate of the said *Benjamin Taliaferro*; as the mother of the said *Henry* and *Richard*, and the heir at law of the survivor of them: that the complainants being the only persons entitled to the proceeds of the said sale, are at liberty to discharge the executor from the necessity of selling, and may elect to take the land itself. This suit was, therefore, brought against the executor and heirs of *Benjamin Taliaferro*, to compel the said executor to deliver up the said estate to the complainants, and to release all his right, title and interest in the same.

Littleton W. Tazewell, admits the allegation of the bill, and says that the reason why he has not exercised his power of selling is, that during the life of *Rebecca Taliaferro*, (who had but recently died,) he supposed that no sale of the reversion of an undivided property, could be made without an immense sacrifice; and that since the termination of the life estate, the right to the property being contested, he was unwilling to do any act which might affect the interest of either party. He professes his willingness either to make sale of the land, or to surrender his interest in it, in any manner or to any person that the court might direct.

The heirs of the said *Benjamin Taliaferro* also answered, and contended, that *Richard* and *Henry Taliaferro* received the estate by purchase from their father, and therefore the real estate must descend to their *paternal* kindred: that the land devised, must be considered as *real* and not *personal* estate in a court of equity, under the circumstances of this case; and that it was purchased, not from the executor, but directly from *Benjamin Taliaferro* himself.

In the progress of the cause, the suit abated as to the complainant *Sophia Ann Smith*, by her death, and was revived in the name of *Larkin Smith*, her administrator; and *Larkin Smith* having also died, it was revived in the name of *William Brooke*, administrator *de bonis non* of *Ann Sophia Smith* deceased.

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The chancellor decided, that upon the principle of equity, things agreed to be done, are to be considered as done; the real estate directed to be sold by the will, ought to be considered *personal* estate: that the widow of *Benjamin Taliaferro* having survived her two sons, though she died in the life-time of her last husband, her personal representative, the plaintiff is entitled to the remaining proceeds of the sales thereof, when the same shall be made, and to the profits which have accrued or may accrue under the sales, first for the benefit of her creditors, and then to the use of those claiming under *Larkin Smith*, the last husband. And that, for these purposes, partitions and sales of the land ought to be made, and an account taken of their profits, as also of the administration of the estate of the said *Benjamin Taliaferro*. He therefore decreed, that certain commissioners should make partition of the said lands: that an account should be rendered of the rents and profits of the said lands, as well as of the administration of *Littleton W. Taxewell*, upon the estate of his testator.

From this interlocutory decree, the defendants obtained an appeal, by petition to the chancellor.

Leigh and *D. Robertson*, for the appellants.

Stanard and *Wickham*, for the appellee.

For the appellants, it was admitted, as a general rule, that land, directed to be sold, will, in equity, be considered as money; but, in questions between the heir and legatee, the character of *personalty* must be *definitively* fixed by the testator. (a) The circumstances which will be relied on to prove that the character of personal estate is definitively fixed on the land devised by this will to be sold, are: 1st. That the money arising from the sale, is

(a) 2 Ves. jun. Oxenden vs. Lord Compton. Do. 170, 183, Walker vs. Donne. 5 Ves. jun. 338, Wheldale vs. Partridge, do. 396.

to be laid out, so as to produce a *certain annual income*. But, such an income may arise, as well from *real* as *personal* estate. 2d. The word *principal*, may be supposed to indicate *personal* estate only. This construction, however, would be much too narrow, because it would exclude an investiture in many species of stock, which are declared by law to be real estate. 3. As little weight is to be attached to the expressions, *assign* and *transfer*; for, these are equally applicable to *real* and *personal* estate; and, even if they were more appropriate to the latter, it should be remembered, that the words of a testator ought not to be examined with technical severity. 4. It may be said, that the mixture of real and personal estate in the will, gives the character of *personalty* to the whole mass. But, in the cases of *Durour vs. Motteux*,^(b) and *Ackroyd vs. Smithson*,^(c) this circumstance was not allowed to have any weight.

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But, the chief argument is, that the will does not direct the land to be sold *positively*, but only says it *may* be done. The executor has a discretion to sell the land or not, as he may think proper; and, therefore, it is not a conversion of the real estate into personal *out and out*, which all the authorities consider requisite.

If all these positions are incorrect, still the only purpose of the sale having failed, by the death of the children before the condition of the estate was changed, the real estate must descend to the heir. This doctrine is supported by the cases of *Cruse vs. Barley*,^(d) *Chitty vs. Parker*,^(e) and *Berry vs. Usher*.^(f) The legacy had not vested at the time of the death of the children;^(g) nor can it be considered as a conversion *out and out*.^(h)

For the *appellee*, it was said, that the principle of equity being admitted, that lands directed to be sold will be con-

(b) 1 Ves. senr. 320.

(c) 1 Bro. Ch. Cas. 500, 510, 511.

(d) 3 P. Will. 22, and Coxe's note.

(e) 2 Ves. jun. 271.

(f) 11 Ves. jun. 87.

(g) Duke of Chandos vs. Talbot, 2 P. Will. 612, and Coxe's note. Co. Litt. 237, a. Hargrave's note.

(h) 8 Ves. jun. 235. 2 Bro. Ch. Cas. 589.

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sidered as money, the appellants must prove, either that this will does not afford a case for the application of the principle; or, that by some subsequent event, the rule has ceased to operate. Both grounds are taken, and will be examined.

1. As to the discretion given to the executor to sell or not, as he thinks proper, the will gives no discretion, except as to the *time* and *manner* of selling the property, but does not leave it to his pleasure to refrain from selling *altogether*. Circumstances might exist, which would render it inexpedient for the testator to fix any definite *time* or *manner* of selling, while, at the same time, it was his determination that the property should be sold. The testator evidently intended that the property should be sold before his sons arrived at twenty-one; because, he requires that the proceeds shall be laid out in such manner, as to produce a certain annual income, to be equally divided between his two sons, *until either of them shall attain the age of twenty-one years, or marries*. The word *may*, in this case, does not imply *discretion*, but is used imperatively.

The devise is of a *mixed* subject of real and personal property, both of which are to be applied to the *payment of debts*, which shall be so invested as to produce a *certain annual income*. One moiety of the *principal* is to be *assigned and transferred* to each of the children. All these terms are peculiarly applicable to *personal* estate. The case of *Doughty vs. Bull*,⁽ⁱ⁾ shews that discretionary words in a will, may be considered as imperative. It is a rule of equity, that the character given to property by the testator is to be retained, unless the legatee make his election to take it in a different character.^(j)

2. It is said, that the purposes of the will having failed by the death of the children, the land will remain in its

(i) 2 P. Will. 390.

(j) Biddulph vs. Biddulph, 12 Ves. jun. 161. Ashby vs. Palmer, 1 Meri-
dale's Rep. 296.

original condition of *real property*. But, the purposes of the will have not failed. The children survived the testator, and their legacy was a *vested* one. The *failure* contemplated by the law, is a *failure to vest*, or where there is a *lapse* of the legacy. In every case of a *vested* legacy, the character impressed by the testator on the property, attaches *immediately*, and can only be altered by the *election* of a person competent to make an election. *(k)* The authorities cited by the counsel for the appellants, to prove that this legacy had not vested, have no application. There is no case where a personal subject is given at a particular time, and interest in the mean time, the legacy is not considered as *vested*. *(l)*

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February 17.—Judge CABELL, delivered the opinion of the court.*

The first question which presents itself in this case, admitting that all necessary parties are before the court, is, whether the interest intended by the will of Benjamin Taliaferro for his two sons, Richard Henry, and Henry Taliaferro, were vested and continuing interests, at the time of their deaths.

This question presents no difficulty. It is clearly a vested interest, unless a different result be produced by the testator having left the time of selling, to the discretion of the executor. In every instance of a sale by an executor, some time must, of necessity, elapse between the death of the testator, and the sale; and something is almost invariably left to the discretion of the executor, as to the time of selling. Yet that makes no difference where, as in this case, the direction to sell is imperative. It has never been doubted, that the devisee or legatee, for whose benefit a sale is thus directed, takes by the will, an

(k) 2 Maddock, 108.

(l) Hewitt vs. Wright, 1 Bro. Ch. Cas. p. 90.

* Judge Brooke did not sit in this cause.

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immediate vested interest; nor has it ever been held, that the death of the devisee or legatee before the sale, defeated that interest, unless there was some provision in the will, to that effect. Under such circumstances, the interest in the proceeds of the sale, is as much a vested interest, as if the land itself had been immediately and directly devised to the devisee. The circumstance in this case, that the testator had only a remainder in the land, expectant on the death of his mother, will not vary the construction, in this particular, which ought to be given to the will. He was well informed of his interest in this land, and yet he expressly subjects to sale, all his estate whether in possession, remainder or reversion. He may; have been aware, that circumstances might, by possibility, render it essential to his children, that the sale should be made, before the life-estate might fall in; and he very prudently left the time of the sale, to the discretion of the executors.

The interests, therefore, intended for the children of the said Benjamin Taliaferro, vested at his death; and there being nothing in the will to defeat them, they were continuing interests at the deaths of the children.

It becomes important to enquire, in the next place, what was the nature and character of those interests.

It is an established principle, "that money directed to be employed in the purchase of land, and land directed to be sold, and turned into money, are to be considered as that species of property into which they are directed to be converted." The English reporters abound with cases upon this subject; and there is no part of the law more firmly established, or better understood. The important question in such cases is, whether the character of land or money is definitively and imperatively affixed, by the will, to the property; for, the character thus impressed upon it, will remain so impressed, until some person having a right to elect, elects to take it in its original character. *Ashby vs. Palmer.*(*m*) Land, therefore, thus

(*m*) 1 Merivale, 296. 2 Maddock, 108, 9, 10; and the cases there cited.

impressed with the character of money, will, until election be made to take it as land, pass as money, although it has not been actually converted into money. The counsel for the appellants relied upon the principle laid down, in *Walker vs. Denne*, (n) that the property will pass according to the state in which it happens to be at the death of the person from whom it is claimed. But, that principle has been repeatedly overruled. *Wheldale vs. Partridge*; (o) *Biddulph vs. Biddulph*; (p) *Kirkman vs. Miles*; (q) *Ashby vs. Palmer*. (r) The other cases, relied on by the counsel for the appellants, have no application. In all of these, there was, from some cause or other, a resulting trust, in whole or in part, for the heir at law of the testator. But, in the case before us, the conversion into money is imperative, "to every intent, out and out:" and the whole proceeds of sale, after payment of debts, are given, as personal property, to the two sons of the testator; and it is to *them, or the survivor of them*, that the succession must now be made. There is then no foundation whatever for any claim on the part of the heirs at law of the testator.

If there were no persons other than the present parties, who might claim an interest in this controversy, the court, pursuing the principles above declared, would affirm the decree of the chancellor.

But, it appears that after the death of the two sons of the testator, Benjamin Taliaferro, their mother, to whom the property in controversy had passed at the death of the survivor of them, as his next of kin, intermarried with Larkin Smith; and that the said Smith and his wife instituted this suit, as the only persons interested in the sale of the land, claiming, by their bill, to discharge the executor from the necessity of selling, and electing to take the land itself. If this election had any operation in fa-

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(n) 2 Vesey, 170.
(o) 8 Ves. 247.
(p) 12 Ves. 161.

(q) 13 Ves. 338.
(r) 1 Merivale, 295.

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vor of the wife, in restoring the land to its original character, as land, it may become important to her heirs at law, as she died before the termination of the suit, and before the land was reduced to possession by the husband, to enquire whether her rights therein descended to them. On this point, the court expresses no impression even, farther than to say, that it is a subject on which the heirs at law ought to have an opportunity to be heard before a final decree. The decree is therefore reversed, with costs to the appellees, as having substantially prevailed; and the cause is remanded to the court of chancery, with directions to make the heirs at law of Mrs. Smith, parties.

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Stubbs against Whiting.

A marriage settlement made *after* marriage, in pursuance of articles entered into *before* marriage, is to be controlled by the articles.

This was an appeal from the chancery court of Williamsburg.

Isabella C. Fox, before her marriage with Emanuel Jones, entered into a marriage settlement, by a deed duly executed and recorded, by which the said Jones conveyed sundry slaves of his own and all the property to which he might be entitled by the marriage aforesaid, in trust *for the sole and separate use of the said Isabella, her heirs and assigns*; and covenanted that he would, at any time during the coverture, ratify and confirm any disposition that the said Isabella might think proper to make, of all or any part of the slaves or other property so conveyed.

The marriage took place ; and some years afterwards, the said Jones died, leaving two infant sons, *Emanuel Macon* and *William Booth Jones*. The decedent left also a will, by which he gave his widow the power of selling or otherwise disposing of his estate called *Woodstock*, and a sum of money that he expects from a suit then depending ; and at her death, he desired that his estate might be equally divided between his said two sons. If either of them should die before twenty-one, or marriage, leaving no issue, the survivor was to receive the portion of his deceased brother ; but, if the said *Isabella* should survive both her children and their issue, he gave her the said estate in fee-simple. The testator appointed the said *Isabella*, and two other persons his executors, desiring at the same time, that the said *Isabella* might act without the interference of the other executors, if she was so disposed, and that no security whatever might be required of her.

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The said *Isabella* alone qualified, without giving security, according to the directions of the will.

In the year 1815, *Isabella Jones* married *John S. Stubbs*, senr., having previously entered into articles of agreement with the said *Stubbs*, by which it is agreed, that all the property of the said *Isabella*, should remain subject to her own control and disposition, freed from the marital rights of the said *Stubbs*, and that all the property of the said *Stubbs*, should be free from the dower and other matrimonial rights of the said *Isabella* ; giving her an unlimited power of disposition during the coverture, and if she survived the said *Stubbs*, without having made any disposition of the said property, then to the only use and behoof of the said *Isabella*, her heirs and assigns forever.

After the marriage between the said *Isabella* and the said *Stubbs*, viz : on the first day of April, 1816, a deed of settlement was executed in pursuance of the said articles, in which *Francis Whiting* was made the trustee ; by which all the property real and personal which had been settled on the said *Isabella* by the deed first mentioned, and

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the will of *Emanuel Jones*, was settled on the said *Isabella* and her children *Emanuel Macon* and *William Booth Jones* or to the use of any other person she might appoint by deed or will.

John S. Stubbs died in 1821 ; and the said *Francis Whiting*, the trustee in the last mentioned deed, filed a bill in the county court of Gloucester, suggesting, that the said *Isabella* was about to convey a part, if not the whole of the said slaves, and other personal property, out of the state, and praying that the sheriff might go forthwith and take possession of the negroes and other personal property, disposed of for the benefit of the said *Isabella* and her children, the said *Emanuel Macon* and *William Booth Jones*.

The county court made an order restraining the said *Isabella C. Stubbs* from removing the negroes and other property belonging to the estate of *Emanuel Jones* deceased, beyond the jurisdiction of the said court ; and that the sheriff should forthwith take possession of all the said negroes and other property, and hire the negroes for the benefit of the defendant and her children, *Emanuel Macon* and *William Booth Jones*, and should keep the other property in his possession, subject to the future order of the court.

Isabella C. Stubbs answered the bill, and affirmed that the deed of trust last mentioned, was executed for the sole purpose of protecting her property from the marital rights of *John S. Stubbs*, and for no other purpose ; and that she considered the whole of the said property as *her own*, which she intends to remove at her own time and pleasure.

An appeal was allowed to the interlocutory decree aforesaid, to the chancery court of Williamsburg.

The chancellor reversed the said decree, and commanded the sheriff of Gloucester, and all persons claiming under it, to return to the appellant all the said property taken from her in pursuance of the said interlocutory decree. And the court enjoined the said *Isabella*, the

appellant, from conveying out of the commonwealth, or permitting any person to whom she shall not have bona fide conveyed by deed made in execution of the power given to her, two-thirds of the property conveyed by *John S. Stubbs*, and wife, to *Francis Whiting* : that the marshal of the court should take into his possession, two-thirds of the slaves and their increase, upon the appellee entering into a bond in the penalty of \$ 1000, with condition to pay to the appellant all damages which she might sustain by reason of this order, if the same should be reversed or annulled ; and unless the appellant shall, upon being served with a copy of this order, enter into bond and security, in the penalty of \$ 10,000, with condition that two-thirds in number and value of the said slaves and their increase, shall be forthcoming to answer any future decree of the court in the premises ; but, if the said bond should not be given within ten days from the service of this order, then the marshal should hire out the slaves so taken, until the end of the year, &c.

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An appeal was allowed to *Isabella C. Stubbs*, the appellant, on her motion.

Leigh, for the appellant.

By the marriage settlement of *Emanuel Jones* and *Isabella C. Fox*, the appellant, and by her surviving him, she became entitled to the property in question, absolutely. The will of the said *Jones* cannot have any influence on property, which had been before conveyed by deed.

By the articles entered into with *Stubbs*, the second husband of *Isabella C. Jones*, all her individual rights over the property in question were preserved to her, free from the control of her intended husband ; and it is expressly provided, that in case of her surviving him. (the event which has happened.) she should be remitted to all the estate which she had before the marriage. The estate was not joint, to her and her two children by *Jones* ; but it

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was *expressly* placed under her entire control, both by the marriage agreement, and by the settlement made after marriage and intended to carry the agreement into effect.

But, if the articles and the deed are at variance, the articles ought to be preferred; more especially where the deed, (as in this case,) professes to follow the articles. The articles are made *before* marriage; the deed *afterwards*; and the authorities are explicit, that in such case, the *articles* will be set up. (a) The chancellor, therefore, erred in requiring her to give bond, that she would not remove the property conveyed by the articles, out of the state; but, if there is any property given by the *will* of *Emanuel Jones*, not comprised in the marriage agreement with him, a restraining order may be proper.

No counsel for the appellee.

March 14.—Judge BROOKE, delivered the opinion of the court.

The court is of opinion, that the appellant having survived her first husband *Emanuel Jones*, took an absolute estate in all the property comprehended in the marriage settlement, bearing date the 23d of February, 1803; and that the deed of settlement, of the 1st day of April, 1816, executed by her second husband, *John S. Stubbs*, and herself, to the appellee, was intended by the parties to be made in pursuance of the marriage articles, entered into between them, before marriage, and bearing date the 18th of July, 1815, and must be controlled thereby; by which she having survived the said *John S. Stubbs*, again became entitled, in absolute right, to all the property included in the marriage articles first above mentioned. The decree, therefore, so far as it restrains the appellant from removing, or otherwise using that property, is erroneous, and must be reversed with costs.

(a) 1 Fonb. Equ. 190, n. p.

And the cause is remanded to the court of chancery, for an enquiry to be made, whether the marriage articles and deed of settlement, between the appellant and her last husband *John S. Stubbs*; embraces any other personal estate, than that derived to her in and by the marriage settlement aforesaid, between her and her first husband *Emanuel Jones*, which she holds as executrix of the will of the said *Jones*; and in that event, further to enquire, whether she has given sufficient security as executrix, and if not, to take such measures, as may be proper and effectual, to compel her to give such security; or otherwise to provide for the preservation of such property, and its ultimate disposition, according to the rights of the parties interested therein. But, in case such security shall have been given, then the bill is to be dismissed.

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**Thweatt's administrator against Jones,
administrator, &c.**

In equity, contribution may be claimed by one inspector of tobacco, against his co-inspector, for the amount of a judgment had against the former, for failing to deliver tobacco, when legally demanded, which judgment he has discharged, when the failure does not proceed *ex maleficio*, or from some actual fraud, or voluntary wrong.

But, it is incumbent on the party asking relief, to shew that he is innocent of such imputations.

The following opinions present so full a view of the case, that any other statement would be unnecessary.

Leigh, for the appellant.

Gilmer, for the appellee.

March 17.—Judge GREEN.

The appellant filed his bill against the appellees, in the superior court of chancery for the Richmond district, charging, that Thweatt and Hinton were joint inspectors of tobacco at Bolling's warehouse: that, after Hinton's death, Brunett brought an action on the case against Thweatt, as surviving inspector of Thweatt and Hinton, for the value of tobacco inspected at the said warehouse, and not delivered according to the tenor of the receipt, and obtained a judgment therefor, which was paid by Thweatt's administrator, amounting, with costs, to 31*l.* 9*s.* 10*d.* A copy of the record of the suit at law is exhibited as a part of the bill. The bill further charges, that Adam Finch brought a suit (an action on the case,) against the said Thweatt and Hinton, the foundation of which was, the non-delivery, by the said inspectors, of

other tobacco, inspected at the said warehouse, to the "said Finch, or his order;" in which he recovered 96l. 15s. 2d., and costs, against Thweatt; the suit having abated as to Hinton, by his death: that, after an unsuccessful appeal and injunction, Thweatt's representative had paid the whole or great part of the judgment, damages and costs. A copy of the record, in Finch's case, is also exhibited with the bill, as a part thereof. The bill also states, that the plaintiff "has been advised that for a moiety of the said judgment, and costs and damages, the estate of Hinton should be responsible, inasmuch as the recoveries were for a joint malversation in office." Joseph Jones, styling himself, in his answer, to be administrator of S. Hinton, deceased, late inspector at Robert Bolling's warehouse, in the town of Petersburg, answered. The answer does not admit or deny the matter of the bill. The record, in Brunett's case, shows that the suit abated as to Thweatt, by his death, and was revived against his representative, against whom the verdict and judgment was rendered; and that the tobacco was inspected, and receipts given, by Thweatt and Hinton; and that the demand, and failure to deliver, was in the lifetime of both, and whilst they were inspectors. The declaration, in Finch's case, charges, that the defendants Thweatt and Hinton had not only failed to deliver the receipts, for the tobacco inspected, to Finch, but had delivered the receipts and tobacco to another person, not authorised to receive the same. The chancellor dismissed the bill, and the plaintiff appealed.

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The bill in question, was a bill for contribution, and the case depends entirely upon the question, whether the bill presents a fit case for contribution, or not?

The counsel for the appellant seemed to think, that this question would turn upon the enquiry, whether the actions of Brunett and Finch, would or would not have survived against the representatives of the inspectors, if they had both died before a recovery had; and he contended, that

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necessary to examine these questions minutely, because they seem to me unimportant to the decision of this case. If, however, it were necessary to show that Histon's representatives were responsible to the owners of the tobacco, notwithstanding his death, that responsibility is fully ascertained by the case of *Scott vs. Hardaway*, (a) in which it was decided in this court, that an inspector was liable, on his official bond, for any injury suffered by any person, in consequence of his misconduct.

Contribution is not due, by reason of any contract, express or implied. But, when any burthen ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is in *equali jure*, contribution is due, unless the claim to contribution has arisen out of some actual fraud, or voluntary wrong, in which the party claiming contribution has participated. The mere non-performance or violation of a civil obligation, is not such a wrong, as will condemn a claim to contribution. (b) The act which precludes a party from the right to claim contribution from those who were equally liable to the burthen as himself, must be malum in se, as actual fraud or voluntary wrong. Thus, if there be a common partition wall between two cotermious tenants, and it becomes ruinous, and one, in spite of the prohibition of the other, pulls it down, and re-builds it, he is entitled to contribution for the expense. (c) Thus, if the donor dies, having sold a part of the lands bound by the recognizance to several purchasers, and leaving a part to descend to his heir, the heir is not entitled to contribution against the purchasers, because he is not in *equali jure*; but the purchasers are (without contract, express or implied,) entitled to contribution against each other; without regard to the time or order of the purchases. So, "if judgment be against two disseisors in assize for the land and damages, and one disseisor dies, the execution shall not be awarded against the surviving

(a) 4 Manf. 363. (b) 1 Ves. & Beames, 117. (c) 4 Johns. Ch. Rep. 394.

"disseisor, who was party to the wrong, but as well the
 "heir as the disseisor shall be charged;" (d) and, *a fortiori*, if the surviving disseisor had paid the damages, he
 ought to have contribution against the representative of
 the deceased disseisor. The reason why the law refuses
 its aid to enforce contribution amongst wrong-doers, is
 that they may be intimidated from committing the wrong,
 by the danger of each being made responsible for all the
 consequences;* a reason, which does not apply to torts or
 injuries arising from mistakes or accidents, or involunta-
 ry omissions in the discharge of official duties. Courts
 of law enforce contribution only in cases where a con-
 tract between the parties to that effect may be presumed;
 but, courts of equity indulge in a larger jurisdiction, and
 admit contribution whenever the parties were originally
 subject, jointly, to the burthen, and are in *equali jure*,
 and where the party claiming the assistance of the court,
 is not precluded, by his own turpitude, from receiving
 it. (e) In the case at bar, the only default of the inspec-
 tors appears to have been the non-delivery of the tobacco
 to the owners of it. This might happen in various ways,
 without imputing fraud or voluntary wrong, to the in-
 spectors. It might have been delivered, as is stated in the
 evidence given in one of the suits at law, (which is, how-
 ever, no evidence against the defendants in this suit,) in
 consequence of the notes or receipts having been delivered
 to a person producing a forged order. It might have
 been delivered to an improper person, by mere mistake,
 or stolen; and, in the absence of all proof, although it
 might have been embezzled by the inspectors, such em-
 bezzlement ought not to be presumed. Fraud is odious,
 and ought to be proved. Nor do I think, that this conclu-
 sion ought to be affected by the statement in the bill, that
 the judgments were recovered for a *joint malversation* in

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(d) 3 Co. Rep. 13. (e) 4 Johns. Ch. Rep. 304. 3 Johns. Ch. Rep.

* The case in 3 T. R. 186, cited at the bar, seems to be one of a voluntary and active tort.

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office. That is a loose expression, corrected by the context of the bill, and by the records of those judgments, which exhibit nothing inconsistent with the supposition that the tobacco was lost to the owners by a fraud practised upon the inspectors, or by their mistake.

The case seems to me to resolve itself into these propositions. When parties are equally bound to bear a burthen, and are in *æquali jure*, that is, liable from the same circumstances existing as to both, contribution is due of right, in equity: that this general proposition is liable to one exception, namely, that the party who would otherwise be entitled to such contribution, forfeits such right, if the joint liability arose from an act *malum in se*, a fraud or voluntary tort, in which he participated: that when it is shewn that the parties were originally equally bound, and stood in *æquali jure*, the party who has paid all, is entitled of course to contribution, unless it be shewn on the other side, that his right has been forfeited as aforesaid, by his own wrongful act. No such fact is alleged or proved in this case.

I do not think, that the right to contribution ought to be considered as impaired by the fact (if it really existed in this case,) that one of the parties and his estate was absorbed by his death from all liability to the party injured. He who claims contribution, does not claim by *substitution* to the rights of the party whose demand he has satisfied; but, upon the broader principle, that he who has exclusively borne the burthen which ought to have been borne *jointly* with another, is entitled to be rateably indemnified, as in the case of party walls, and average in cases of loss at sea, &c. I presume, (though I have seen no case to that effect,) that if two were bound in a joint obligation before our statute concerning joint rights and obligations for a joint debt or contract, and one of them had died, and the other had discharged the obligation, he would have been entitled to contribution against the executors of the deceased obligor, although they were at law complete-

ly exonerated. I think the decree should be reversed, and the plaintiff declared to be entitled to recover against the defendant a moiety of the judgments, costs and damages paid by him or his predecessors.

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Judge COALTER.

This is a bill for contribution, filed by the appellant against the appellee. It is alleged, that their intestates were many years ago co-inspectors of tobacco, at Bolling's warehouse in Petersburg, and that two judgments had been recovered, one against Thweatt in his life-time, and one against the appellant as his administrator, for breaches of duty in office, alleged to have taken place in the life-time of both inspectors.

As a reason for resorting to a court of equity, instead of going to law, the bill alleges that the appellee had delivered over the assets of his intestate to the distributees, who are made parties, and a discovery of assets is therefore required. In other respects, it is a naked bill for contribution between two officers, against one of whom there had been judgments at law for a failure and refusal to deliver tobacco in one case, and notes in the other to the owners; and it is claimed in the bill on the mere ground, as is alleged, that the recoveries at law were for a joint *malversation in office*; the whole, or a great part of the damages recovered for which, had been paid by the appellant out of his intestate's estate. It is, therefore, as naked a case in equity, as a declaration on an implied assumpsit, arising from the mere payment of the money by one inspector, would be at law: and the question is, whether, in such a case, contribution can be decreed between two such *wrong-doers*; admitting that both are proved to be so.

It is said, however, that though the bill expressly alleges that the recoveries at law were for a *joint malversation in office*, yet if we take the records of those judgments as part of the bill, they being referred to as

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part thereof, that the case will appear to be one in which contribution can properly be decreed, without violence to the general principle of law which repels such claim between *wrong-doers*.

One of these suits was instituted against both inspectors; it abated by the death of Hinton, and judgment finally obtained against Thweatt, who survived.

It is an action on the case for a violation of their duties in their office, in not delivering tobacco notes to the owner of tobacco inspected by them; and on the plea of not guilty, there is verdict and judgment for the plaintiff.

In this case, the defendant moved for a non-suit, because the evidence introduced by the plaintiff, was not sufficient to support his action. The evidence was, that the son of the plaintiff, by his directions, applied to the inspectors for his notes; that the defendant shewed him the books, by which it appeared, the tobacco had been inspected, but was told it had been shipped, the inspectors alleging they had issued notes for it, in pursuance of an order in the name of the plaintiff, which order they shewed, but which, the witness told them, he knew was not the hand writing of the plaintiff: That the witness afterwards produced a written order from the plaintiff for the notes, but they were refused.

Even if this was evidence against the appellee in this case, as far as it goes, and if full proof, that the inspectors had been defrauded of the tobacco, would justify a decree for contribution, yet the proper evidence is not produced, nor is there an allegation in the bill, to justify its exhibition, unless this statement in the record, is to be taken as such allegation. The alleged forged order is neither produced on the trial at law, nor is it exhibited in this suit; nor is it stated who provided it or received the notes, or what has been done with the tobacco. If it was shipped, the books directed to be kept by the 48th section of the act, would shew by whom, and probably who was the inspector who delivered it out.

The bill alleges, that there had been an injunction to this judgment, which had been dissolved; but on what ground it was granted, whether on account of this order or not, is neither stated, nor are the proceedings in that case, made part of this, if it would be evidence in this case.

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The other suit, was likewise an action on the case against Thweatt, instituted after the death of Hinton, alleging that they jointly issued tobacco notes; that, in the life-time of Hinton, the tobacco was demanded, and not delivered; and that, after his death, it was again demanded of Thweatt, who continued in the office of inspector, and who, fraudulently and contrary to law, refused to deliver it. To this, there was also a plea of not guilty, and a general verdict and judgment for the plaintiff.

It was not necessary for the plaintiffs in these suits, to prove an actual embezzlement of the tobacco, in order to entitle them to recover; a delivery into the warehouse, and a refusal of the notes in the one case, and of the tobacco in the other, was sufficient. Such proof made the inspector a wrong-doer, as to the plaintiffs, and subjected him to their action; but, for aught that appears to the contrary, actual fraud or culpable neglect may have been proved as to the defendant.

I can discover no ground, therefore, on which I can consider this case, otherwise than as a naked one of contribution, sought between public officers, in consequence of damages recovered, and paid by one of them, for a joint malversation in office, even if it had not been expressly so called in the bill itself. I am not at liberty to make any thing else of it, because nothing else is stated, much less proved. I cannot say the notes in the one case were issued in consequence of a forged order, or the other tobacco taken from the warehouse, on the production of forged notes; or that it was stolen, or otherwise taken, without gain to the inspectors, or either of them, and that they have lost it without any culpable neglect in either; nor am I prepared, as between public officers of such trust

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and responsibility, to say, how far motives to vigilance and attention should be lessened, by a decree for contribution in such case, were it made out. The general doctrine is, that, even between private individuals, there is no contribution between joint *wrong-doers*. It is not for me to say, that these parties are not to be considered as *wrong-doers*, unless embezzlement, or culpable neglect is proved in this cause. It is not to be expected that either party would prove this in both, and of course, in himself; and then it must result that contribution will lie in all cases of this kind, unless the verdict which has found the wrong as to the third party, is considered conclusive, until the party claiming it can make out a proper case for contribution, notwithstanding such verdict.

The parties will try each to criminate the other, so as to throw the whole burthen from himself; but it cannot be expected, that a defendant in such case, will try to fix guilt on both, otherwise than as it is established by the verdict. And the court itself, from motives of public policy, will notice that. This doctrine, I think, is clearly laid down in *Merriweather vs. Nixon*.(f) That was an action on the case against two, for an injury done to the reversionary estate in a mill, in which was a count also in *trover* for the machinery. In that case too, there was a joint judgment, so that *both were found guilty*. The whole sum was levied on one, who brought his action for contribution. The judge was of opinion, that no contribution could by law be claimed, as between joint wrong-doers; and that, consequently, the action on an *implied assumpsit* could not be maintained on the *new* ground, that the plaintiff had alone paid the money, and he non-suited the plaintiff. On a motion to set this aside, Lord Kenyon said, he never had heard of such an action being brought, where the former recovery was for a tort.

There being no judgment establishing a wrong against Hinton, and what defence he could have made we know

(f) 8 T. R. 186.

not ; it must be like a case where a party injured sues one, for he is not obliged to sue all, guilty of a wrong ; if that one comes for contribution against others, he surely must make out a case which will justify a recovery against them. The *mere* judgment against him, and payment, is not enough.

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There is no verdict establishing guilt of any kind on the appellee's intestate ; he might have been sick during the whole time the tobacco was in the warehouse, or absent during the delivery, and have been protected by the provisions of the 11th and 15th sections of the act. In the absence of a verdict then, to convict him of any wrong or liability, or any proof of such liability, I cannot say that because one has been found liable, the other must of necessity be so too ; and although a joint malversation ; although it is *charged* in the bill, there is no *proof* that the intestate of the appellee, was even an inspector, much less that he had any thing to do with the tobacco in question, other than what is to be found in the declarations in the actions at law, and the evidence spread on the record, when Hinton was dead, and no longer a party to the first suit. The answer of his administrator, says nothing as to these matters, otherwise than calling himself administrator of Hinton, late inspector, but is confined to the discovery of the assets sought of him.

I cannot think that the relation between these parties, as inspectors, is a ground whereon to relax the sound principle of law above insisted on. It would seem to me the reverse ; and that it might tend to encourage negligence, if not frauds by inspectors, to hold out a hope, that if matters come to the worst, the burthen will be divided. On the contrary, this court has decided that the vigilant inspector may throw the whole burthen on the fraudulent one, and even hold his securities bound therefor.(g) They give separate bonds, and each is severally

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liable for his own improper acts. If both are fraudulent, or both negligent, so that no case can be made out by either, so as to throw the whole, or part of the burthen on his fellow, which proper vigilance will generally enable him to do, I think it safest to let them abide by the consequences.

I am, therefore, for affirming the decree.

Judge CABELL.

The new lights thrown on this case by the second argument, have convinced me, that my first views were erroneous; and I take pleasure in abandoning them.

It is admitted to be an universal principle, that where two or more persons have jointly committed a *tort*, no court of justice, either of law or equity, will interfere to enforce contribution among the participators in the *tort*. But this principle has never been held to extend to the non-performance of a *contract*; nor even to the non-performance of a civil obligation or duty, where that non-performance does not proceed, *ex maleficio*. (*h*)

Although inspectors may not, strictly speaking, be considered as bailees, yet I can perceive no objection to the position maintained by the counsel for the appellant, that in determining the liability of inspectors to individuals, whose tobacco they have received, we are to be governed by the same principles, which regulate the liabilities of ordinary joint bailees, to persons whose property they have received, or a contract of bailment. The duties of inspectors, in relation to persons whose tobacco they receive, resulting either from the general provisions of the act of assembly on the subject, or from the special written contracts, exhibited in the receipts or notes given by the inspectors, do not vary in character, from the duties of ordinary bailees, growing out of a common contract of bailment. And, if there be a joint failure in two or more

(*h*) *Lingard vs. Bromley*, 1 Ves. and Beames, 114.

bailees to comply with a contract of bailment, which failure does not arise *ex maleficio*, I hold it to be clear law, that one of them who may have been compelled to pay all the damages recovered, may resort to the others for contribution. If it were otherwise, it would produce great injustice.

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If it be said, that the idea of a contract ought to be excluded in the consideration of this case, for that inspectors are public officers, and that, consequently, their duties spring from official obligation, and not from the terms of a voluntary contract; I reply, that there is no difference, in my opinion, between duties resulting from a voluntary contract, and duties resulting from an office which a man has voluntarily accepted. And even if there be a difference, the general principles established in the case of *Lingard vs. Bromley*, before referred to, apply with full force to the case of joint inspectors.

It is objected, however, that the complainant's case, as exhibited by his own bill, does not entitle him to relief, even on the principles above stated. The bill alleges, that the judgments, as to which contribution is sought for, were obtained for the failure to deliver tobacco which the inspectors had received for inspection. And it is now objected, that this failure *may* have proceeded, *ex maleficio*; but it is equally probable, that it *did not*; and, in such a case, I do not hold myself at liberty to presume that the failure proceeded from embezzlement, fraud, or even culpable negligence, on the part of the inspectors, or either of them, until it shall be proved; especially when we know that they act under the solemn obligations of an oath. It would be to invert the order of evidence to require from them, or either of them, proof of the *non-existence* of such embezzlement, fraud or negligence. The *onus probandi*, is on him who maintains the affirmative of the proposition. As to the expression in the bill, "joint malversation in office," so confidently relied on by the counsel for the appellees, it is to be remarked, that it

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forms no part of the *allegata* of the complainant; and it would be too strict, for a court of equity to hold a man bound to *technical* accuracy of expression, in unimportant parts of his bill.

I, therefore, think the decree should be reversed, and the cause remanded for farther proceedings, pursuant to the above principles.

Judge BROOKE.

The single enquiry in this case is, whether a joint inspector of tobacco, who has been compelled by judgments at law, to pay damages for failing to deliver inspected tobacco, can have contribution against the representative of his co-inspector, without alleging in his bill and proving, that the failure to deliver the tobacco, was produced by some inevitable circumstance, or other cause exempting the inspectors from the charge of *refusing* to deliver the tobacco, when legally demanded. I suppose this to be the inquiry in this case; because, if a case is really made out, in which the failure to deliver the tobacco, proceeded from no default of the inspectors, I am inclined to think the plaintiff would be relieved, whatever may have been the form of the actions at law in which the judgments were rendered. The bill, I think, exhibits no such case, and the proofs in the record furnish no aid to supply its defects. If the rule that the *allegata* and *probata*, must correspond, could be dispensed with, as to one of the cases, it alleges that the suit was prosecuted against the plaintiff's intestate, for the failure to deliver tobacco inspected, agreeably to the tenor of the receipt, for exportation, and that the foundation of the other suit, was the non-delivery of other tobacco; the authority to receive which, is not denied to the party demanding it; and it concludes with saying that the plaintiff is advised that for a moiety of the judgments, costs, and damages, so recovered against the estate of his intestate, he is entitled to contribution,

in as much as the said recoveries were for a *joint malversation* in office. The proceedings at law verify the allegations in the bill, with the exception, that in one of the cases, it is alleged that the inspectors refused to deliver the tobacco, because it had been before delivered to an order, which is said, but not proved, to have been forged. The answer is by the administrator of the deceased inspector, and neither admits nor denies the allegations in the bill, but insists that the recourse ought to be had to the distributees of his intestate, to whom the estate had been delivered. I shall lay no stress on the last allegation in the bill, that the judgments were for a *joint malversation* in office, because, I think it gives the correct character to the case before stated by the plaintiff,—the failure to deliver the tobacco by the inspectors, without assigning any other than the circumstances before stated, as the cause was a refusal to deliver it, which was a *joint malversation* in office. That other circumstances may have existed, is possible, but none are alleged or proved. The refusal to deliver the tobacco, under the circumstances alleged, was a *joint wrong* in the inspectors, and to *joint wrong-doers*, neither a court of equity nor of law, will afford contribution. The case in 8 Term Reports, proceeds on this rule. The principle in both courts is, that *joint wrong-doers*, shall not be tempted to commit wrong by dividing the responsibility. This principle applies *a fortiori* to public officers. I admit, that courts of equity, take a broader jurisdiction. They relieve in cases to which the jurisdiction of a court of law is not adapted. They relieve in all cases, in which the parties are in *æquali jure*, but neither court will relieve in a case in which they are in *pari delicto*, which I consider to be the case now before the court. The case in Vesey and Beames, was decided upon this distinction. I am, therefore, still of opinion, the decree must be affirmed.

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Heth against Cocke and wife.

A widow is not entitled to dower of real estate, which had been mortgaged by her husband, *before* the marriage.

The only claim of the widow in such case, is to dower in the *equity of redemption*. The same principle applies as well to mortgages *after* marriage, where the wife unites in the mortgage, and has been privily examined, as to mortgages *before* marriage.

Quere, whether a widow does not forfeit her right to dower, by standing by and seeing the land sold to an innocent purchaser, without giving notice of her title?

This was an appeal from the chancery court of Richmond.

The case was this :

William Ronald, in 1788, mortgaged to *Mary Plumstead*, an undivided moiety of 99½ acres of land, lying in the county of Chesterfield, on which certain coal-pits called the Black-heath coal-pits were situated. The mortgage was to secure the payment of 1090*l.* 10*s.* in two instalments.

William Ronald died in 1793, intestate, leaving a widow and two infant children; and *William Bentley* became his administrator and the guardian of his children.

Soon after the death of *William Ronald*, a suit was instituted by *Samuel Swann*, (who had purchased the right of the said *Mary Plumstead* in the said mortgage) against the said *Bentley* as the administrator of the said *Ronald* and guardian of his children, to foreclose the mortgage; and a decree was rendered in 1795, to sell the land by a certain day, unless the money due on the mortgage, should be paid by *Bentley* before that time. To this suit, *Catharine* (the widow of *Ronald*) was not a party.

The money not being paid, the land was sold, and *Harry Heth* and *John Stewart*, under the firm of *Heth and Stewart*, became the purchasers for 3150*l.*; out of which

1486*l.* 1*s.* 4*d.* was paid to Swann; and 1663*l.* 18*s.* 8*d.* was paid to Bentley, as guardian of the infant children of Ronald.

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Catharine Ronald afterwards married *William A. Cocke*; and they jointly filed a bill against *Heth* and *Stewart*, *Bentley* and the administrator of *Swann*, asserting the right of the female plaintiff to *one-third of the said land and its profits, since the death of Ronald, or to one-third of the profits until the sale, and then one-third of the amount of the sale, with interest thereon*: that the female plaintiff, not having been a party to the suit for foreclosure, is not bound by the decree or sale: they also pray, that *John and Samuel Swann*, who leased the said coal-pits of *Bentley*, for three years, may pay to the plaintiffs *one-third of the rent*.

All the defendants denied the validity of the plaintiffs' claim. The representative of *Swann*, pleaded the act of limitations to the claim for one-third of the rents while the coal-pits were in the occupation of his testator.

Heth pleaded, that he was an innocent purchaser without notice, under the decree of the court, and that before he had notice of the claim of the plaintiffs, he had paid for the said land.

By an amended bill, the sureties of *William Bentley* to his guardian's bond, and the representatives of such of them as had died, were made parties.

The chancellor decreed, that certain commissioners should assign and lay off the dower of the female plaintiff, in the said land and coal-pits; that *Heth* should render an account of the annual rents and profits of the premises in question, from the filing of the bill; and that the bills, as to all other matters, should be dismissed.

From this decree, *Heth* prayed an appeal, which was granted.

This cause was argued by *Hay* and *Wickham* for the appellant, and by *O'Reilly* for the appellees.

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This is the first case, that has come before this court under the act of assembly, entitling a widow to dower in a trust estate. It is of great importance, therefore, that, in the first decisions under it, the court should proceed with caution and circumspection.

I think that a fair and sound construction of the act will justify a claim to dower in the case of an equity of redemption in mortgages in fee by the husband, before marriage; which is the case now before the court; and I can at present see no reason why it should not also extend to cases of mortgages in fee after marriage, where the wife unites in the mortgage, and is privily examined.

The cases appear to me entirely similar; so much so, that if the widow is not entitled in the latter case, I cannot perceive how she can be in the former. In England, the wife is not entitled to dower in cases of mortgages in fee before marriage, although the husband is to *courtesy*; but, as to mortgages for terms for years, she is entitled, upon keeping down the interest of one-third, or redeeming, by paying one-third; but, as to the mortgages, she must pay the whole money, and hold over for the residue.(a) But, *courtesy* and *dower*, being put on the same footing by this act, it is fair to presume that the legislature intended to give dower where the husband has *courtesy*; and the courts of England seem to lament that it had not been so decided there in the first instance.

If the husband mortgages in fee, before marriage, and never redeems, he has never been seized, during the coverture, so that the legal title to dower never has accrued; but there is an equity of redemption in him, and which descends to his heir; and in which, agreeably to the above principles, the wife can now claim dower under the act. So, if he is seized during the coverture, and mort-

(a) Pow. on Mort. 286-7; 2 P. Wms. 632.

* Judge Green did not sit in this case.

gages in fee, his wife uniting with him, she has parted with her dower, at law, but still there is an equity of redemption in the husband, which, in like manner, descends to his heir; and in which, I presume, she may equally claim dower, in equity, under the act aforesaid.

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I say, in equity; because, in neither case can she claim it at law, as it regards the creditor. As it regards the heir, it is possible a court of law, since the act, would not permit him to plead the mortgage in fee, though unsatisfied, in bar of dower, as he could have done before; though a court of equity would be open to him, as well against her, as against a tenant by the courtesy, to compel her to keep down the interest, to the extent of her claim; but whether she would be dowerable at law, or not, against the heir, I am not to be considered as giving any decided opinion. Doubtless, he may endow her, on her agreeing to keep down the interest of one-third of the debt; but this she will not be obliged to accept; for the interest of a third of the debt may be greater than the rents of a third of the estate, although that estate may sell, on a bill to foreclose, for much more than the debt, inasmuch as lands will frequently, in this country, sell for more money than the profits will pay the interest of. Whether she shall be obliged to join the heir in redeeming, or forfeit her dower, or be let in, after the profits shall have compensated him, may be a question also worthy of consideration, when it arrives: but, as to the creditor, if he is unwilling to receive his interest, or it is not paid, and he comes in to foreclose, he will be entitled to receive the whole of his debt; and if neither the heir nor widow redeems, and the land sells for more than the debt, the excess is the value of the equity of redemption, and she can only be endowed of one-third of that excess.

The decree of the chancellor, seems to consider the right to dower, as a legal one against the creditor, and to place the widow in the same situation, as she would have stood, had the husband redeemed, during the coverture; so that

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had the land been mortgaged for its full value, the security of the creditor, by the after marriage of the mortgager, would be diminished as far as the value of the dower. I can see no greater reason, why this should be the case in the instance before us, than if there had been a mortgage to the full value after marriage, she joining and being privily examined. Suppose she had been defendant in this suit, could she have claimed to have her dower laid off, and the residue sold? I apprehend the mortgagee could not have been compelled to sell in parcels, which, especially in coal-pits, might greatly diminish the value of his security, and perhaps put his debt in danger. But, if he could have been paid in this way, could the heir be thus deprived of his interest in the equity of redemption? The two-thirds may only sell for enough to pay the debt, and sell too at a great sacrifice, in consequence of this severance of the property.

The equity of redemption was all that was in the husband: she and the heir stand in his shoes, and are both entitled under him, or rather the heir is entitled under him, and she under the heir, and neither can take all. They not only claim through him, but cannot take a greater interest or different estate, than that which he held. It could not be the intention of the law, to change the nature of the estate, so as to vest a legal title in her, to the prejudice of the creditor, and thereby, to work a change in the nature of his security. The husband had his courtesy before the act in equity, and on terms of redemption. He surely does not take a different kind of interest by virtue of this act, than he did before; and yet the act applies as well to courtesy, as dower, and its evident object was to put both on the same footing.

The claim, then, is only an equitable one, at least as it regards the creditor, and must be subject to the principles regulating courts of equity. If she parts with her dower by joining in a mortgage after marriage, leaving only an equity in her husband, and which enures to her under the

act, it cannot be said that it ensures to her as a legal estate, which she is entitled to assert without redeeming ; otherwise, her joining in the mortgage would pass nothing. Surely in such case, she only has a right to redeem. Whether she would also be obliged to redeem a subsequent mortgage, unless she also united in that mortgage, so as to bar her equity, will also be a question worthy of consideration, whenever it shall arise. On the whole, I think it must be manifest, that her interest in the case before us, as to the creditor and the purchaser, under the decree in question, is only an equitable one. Had the creditor, instead of foreclosing, brought his ejectment and got possession, must she not have come to equity to redeem ?

I have considerable doubts, whether it was necessary to make the widow a party, under the circumstances of this case, to the suit, to foreclose the mortgage, and under which, the appellee claims. She is clearly, I think, not entitled to any thing more, than she would have been, had this been a mortgage after marriage, she uniting and being privily examined. In such case, or where the mortgage was before marriage, suppose the bill to foreclose, is brought in the life-time of the husband, must she be a party ? Her husband in that case, has an equity, and so has she, as before stated under the act. It may be said though, that this right is contingent, during the life of the husband ; but, if she was a party, might not a court of equity, on his failure to redeem, very properly provide a settlement for her, equal to one-third of the balance of the purchase money in case she survived ? And if this was not done, might not mortgages for small sums be resorted to, in order to defeat dower rights ; the wife during coverture not having it in her power to redeem ? And would this failure to make the wife a party in such case, subject the purchaser to her claim for dower, in case of her surviving her husband ? Is she more a privy in that case, than in this ? But, in the case put, I believe it never has been held necessary since the act, to make the wife a party.

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It may, however, be well worthy of consideration, how far it may be the duty of courts in such case as that, or of this, if they are alike in that respect, to direct the balance of the purchase money, to be paid into court, and to enquire whether there be a wife entitled, and make provision accordingly. This I merely throw out for consideration and caution, without intending to be understood as giving any opinion upon it.

It may be, that when her right becomes vested, by the death of her husband, although the heir, who represents the inheritance, is a party, she ought to be so too, as she may wish to redeem, if he does not; and I should be strongly inclined to think so, provided, she had made any assertion of her rights; if she had claimed dower of the heir, and had got possession, and paid her third of the interest, so as to shew her election and willingness to claim her dower notwithstanding the mortgage. But, when the debt was large, as in this case, where it would not have been her interest to redeem, even by paying one-third, much less the whole, the heirs being unable to pay their part, and this in coal-pits, requiring great capital to make them profitable; and when, so far from any semblance or wish of this kind, she had permitted the guardian of the heirs to rent out the property for their benefit, as appeared in the suit to foreclose, the irregularity, if any, in not making her a party, is not so great. The court and parties, without much blame, may well have glided into it; but, it is not every irregularity in the proceedings, that will affect an innocent purchaser under a decree. In the case in *Schoal. and Lef.* (b) cited by the bar, the chancellor, speaking of the case in 9 *Ves.* (c) says: That in that case, there were not proper parties, and he supposes the length of time weighed with Lord Eldon in that case. Besides, in this case, the heirs who represented the inheritance were parties, and unable to redeem.

(b) 2 *Schoal. and Lef.* 565.

(c) 9 *Ves.* *Loyd vs. Johns.*

The inheritance is gone, and the decree cannot be disturbed as to them. She cannot now redeem by paying the whole debt so as to take the fee, which is vested in the purchaser, to herself. She does not offer to redeem, as I understand, by paying one-third of the debt and interest, which she would lose if she died the next day, and be let into the third of the coal-pits for life only.

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Admitting, however, that it would have been most regular to have made her a party, I shall consider whether, under all the circumstances of this case, she has now a right to come in for the purposes of redeeming, in any way whatever, as it regards the appellant.

It appears, that just before the death of William Ronald, her husband, he was in possession of, and working these coal-pits; and that soon after his death, they were demise by the guardian of her children for three years. She could not be ignorant, then, of the rights of her husband and children in that property, or that Bentley, the administrator, was also their guardian, and had made a lease of the property as aforesaid. If she herself had rights in the property, which she intended to assert, she must also be presumed to have known the nature of those rights. It is not alleged, in the original bill, that she was ignorant of her rights, or of the proceedings under the mortgage, or that she was able to redeem the mortgage, or that it could have been redeemed out of the personal estate. All these allegations, so far as they are made, are after-thoughts, and come out in the amended bill; but, even in that, she does not allege ignorance of her rights, if such ignorance would avail her.

Her husband died in February, 1793, possessed, not only of this property, but of three plantations in Powhatan, where she has resided. Whether she has been endowed of the whole real estate, including the coal-pits, out of these plantations, or could have been, or now can be so endowed, does not appear. This suit was instituted in October, 1809, upwards of sixteen years after her

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rights accrued; during all which time, she neither asserted any claim to this property, nor even made known her existence; of both which, the appellant was ignorant, as his answer, which is responsive to the bill in this particular, proves. For many years, too, after the sale of this land, under the decree, and the purchase by the appellant, and another, the residue of the purchase money, of about 1663*l.*, with interest, after paying the mortgage debt of about 1446*l.*, was unpaid by the purchasers to the guardian. He had taken a deed of trust on the property, to secure it. This deed of trust was finally enforced, after ninety days public notice, the property purchased by the appellant, and the money paid over to the guardian. She does not pretend ignorance of these facts: They are stated in her amended bill, without such pretence; and now, when it is stated that the guardian, who received this fund, is insolvent, she asserts her claim. Suppose some one else had purchased this land, under this deed of trust, and had got the legal title in fee, as the appellant has, with what face could she have come into a court of equity with such a claim?

Whether this fund has been applied to pay debts of the estate, so as to exonerate slaves, or other personal property, of which she may be in the enjoyment, or has been applied by the guardian, otherwise for the benefit of his wards, or has been embezzled by him, does not appear. No accounts are asked for of this subject; or rather, being first asked for, are finally abandoned; and I have, therefore, a right to presume, notwithstanding the alleged insolvency of the guardian, that they have been in some way applied to the benefit of those interested, perhaps to the exclusive benefit of the heirs, without giving her the proportion to which she may have been entitled. An embezzlement of them by him is not charged. If he has not accounted for that fund, those entitled thereto can resort to his bond. The appellant, I presume, has no right to sue on it.

As to her power, or willingness to redeem, at the time of the sale, there is no such allegation in the original bill, either out of the personal fund, or her separate estate. The reverse is manifest. The administrator says, he had fully administered the personal fund, and no separate estate is alleged or shewn to be in her. She lies by, in hopes that the rents will redeem for her; and does not now offer to redeem, except by first applying them to that purpose. These rents too, arise, not from the cultivation of the soil, but from the profits of coal-pits, necessarily carried on at great expense and risque, from which, few, I believe, have escaped without injury; and no offer to join, either in those expenses or risques; and, indeed, from what appears in the record, may have arisen from new pits, opened since her husband's death. If she had been possessed of a separate estate to redeem with, could any one suppose, that a widow, comfortably settled at a distance, would have invested it in coal-pits? Had she been made a defendant, she could only have preserved her claim by the same means, by which her husband could have preserved his; that is, by paying the whole debt to the creditor, who would not have been bound to receive one-third from her.

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The first bill is filed on the supposition, that the mortgage was made after marriage, and claims a third of the pits and rents, or one-third of the purchase money, with interest. It turns out, though, to be a mortgage before marriage; and in her amended bill, she claims a right to redeem; not being a party to the bill, to foreclose. She says, she had no actual notice of that suit and decree, which she says was hurried, and taken up out of turn, &c. But, she does not say, that she was ignorant of the sale under that decree; nor can it be presumed, that she was long ignorant of it, or that she had made no enquiry as to what had become of this portion of her husband's estate; nor can she be presumed to have been long ignorant of the sum secured, and finally paid to the guardian as aforesaid.

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On the whole, therefore, although her right to dower in this case is given to her by law, and so far may be considered a legal right, yet it is a right of such a nature, that, as to the appellant, it could only be asserted in a court of equity, under the power thus to permit redemption, after the forfeiture of the legal estate at law; and this right to an equitable interposition, she may waive or abandon, as I think she has done in this case. And, even if her rights are of a higher nature, in as much as she must come into equity, to assert and have the benefit of those rights, it might well be questioned, whether by standing by, as it were, and seeing the legal title pass to an innocent purchaser, she is not to be considered, as to him, as guilty of a fraud and concealment, which would justify a court of equity, in refusing its aid.

I am, therefore, for reversing the decree, and dismissing the bill as to the appellant.

Judges CABELL and BROOKE concurred, and the decree was reversed.

Gregory's administrator against Marks's administrator.

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A man dies intestate, leaving a widow and three infant children. The widow marries a second husband. Two of the children die under age, leaving the slaves, derived from their father, to be divided between their mother and the surviving child. The mother and her second husband bring a friendly suit in chancery, against the administrator and surviving child of the first husband, to obtain a division of the slaves of the deceased children. Commissioners are appointed to make the division, who perform that duty; but their report is never returned, and of course, never confirmed. The slaves remain on a plantation, in possession of the second husband and his wife. In this state of things, the second husband dies. His administrator brings a suit in chancery, to recover the slaves so assigned to his wife, as being vested in him absolutely, by virtue of his marriage. *Held* by a divided court, that under the circumstances of the case, the husband did *not* acquire a right to the slaves.

Quere, how far a possession by a husband, under an interlocutory decree, *agreed to*, and *acquiesced in*, by an executor or administrator, and all parties concerned, will be considered as vesting the property in the husband and his representatives?

A court of equity, has jurisdiction for the recovery of slaves, wherever a discovery of the increase of female slaves, after a considerable lapse of time, and an account of hires and profits of a stock of slaves, where some of them may have been young and chargeable.

This case is so fully stated and argued in the following opinions, that any other report would be unnecessary.

Leigh, for the appellant.

No counsel for the appellee.

March 17.—Judge GREEN, delivered his opinion.

Theodorick Morrison died intestate, leaving his wife, Mary, and three infant children, by the said Mary, surviving him. Two of those children died intestate, under age, and unmarried, leaving their mother, Mary, and sis-

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ter, Ann Morrison, an infant, their distributees. Mary intermarried with Stith Gregory; and, on the 11th day of December, 1804, said Gregory and wife exhibited their bill, in the county court of Prince George, against Peter Bland, administrator of Morrison, and Ann Morrison, claiming a partition of the slaves of Morrison's estate, and an assignment of the dower of the plaintiff, Mary, therein. The infant defendant, Ann, by her guardian *ad litem*, the said Peter Bland, answered, and submitted her interests to the court. Bland, the administrator, answered, and declared, that he would not urge any objection to the decree, (sought by the bill,) if the complainants would execute to him a bond, with good security, for 129*l.* 5*s.* 6*d.* due to him by the female plaintiff, for purchases at his intestate's sale, and execute to him a refunding bond, with good security, agreeably to law. On the same 11th day of December, 1804, the court pronounced a decree, appointing James Cureton, Thomas Cocke, Edward Marks, Jr., and James Dunn, or any three of them, "to divide the negroes belonging to the estate of Theodorick Morrison, into three equal parts;" and, "that they allot one equal part to the said Stith Gregory, and Mary, his wife, in fee simple; and, the remaining two parts, to Nancy Morrison, the defendant, subject to the widow's dower, in the said slaves, which the said commissioners will first allot to the said S. Gregory, and Mary, in right of said Mary, for and during her life. And, it is further adjudged, ordered, and decreed, that Stith Gregory should execute bond and security to Bland, for the 129*l.* 5*s.* 6*d.*; and that Stith Gregory should execute to Bland the usual refunding bond, with security. And, if the negroes could not be equally divided in kind, the commissioners were to sell such as might be necessary to equalise the division, and assign the bonds, in due proportion, to Gregory and wife, and Ann Morrison."

It seems, that the residence of S. Gregory and his wife, was at a plantation belonging, in her own right, to Mrs.

Gregory, and on which Theodorick Morrison had lived : that, when the aforesaid decree was made, the negroes of Morrison's estate had been hired out by Bland, the administrator, for the year 1804 : that, at the end of the year, they were collected by Gregory, at his plantation ; and, on the first day of January, 1805, three of the commissioners attended there, and, in the absence of Bland, and without any notice to him, as far as appears, proceeded to execute the said decree, and assigned Phillis, and her five children, Dick, Billy, James, Mary, and Winney, Robin, old Frank, jun., old Peter, and Milly, to Gregory and wife, in fee simple, being a third part of the negroes ; and assigned as the dower of Mrs. Gregory, Letty and three children, Bob, Jack, Ned, and Rico. And the said commissioners, James Cureton, Edward Marks, jr. and James Dunn, signed reports to that effect. But, the same were not returned to the court.

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The commissioners made no formal delivery of the slaves so assigned to S. Gregory, but left them in his possession, (to use the expression of Dunn, one of the commissioners, who was examined as a witness in this cause,) and Stith Gregory claimed and held them as his own, and they were considered as his by the said Dunn, as long as Gregory lived, and he proposed to sell some of them. And he continued thus, to hold and use them as his own, until the time of his death, on the 8th of January, 1806 ; nor is there any allegation by any of the parties, or a *scintilla* of proof, that Bland or any other person, made the slightest objection to this division and possession by Stith Gregory, during the life of Gregory. After Gregory's death, the slaves in question continued under the overseer, under whom he had placed them, until the end of the year, 1806. It does not appear what was done with the slaves, assigned to the infant, Ann Morrison, upon the division, nor whether they remained in Gregory's possession, or were taken possession of by Bland, or any other person. Sylvanus Gregory administered on the es-

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tate of Stith Gregory ; at what time, does not appear. And when the estate of Stith Gregory was appraised, the negroes in question were not appraised, because the overseer, Benjamin Harrison, stated to the appraisers, that Bland had stated to him, that the division was in his opinion, unfair ; and that he should move the court for a new division. When this appraisement was made, does not appear, nor whether Sylvanus Gregory was present ; though it is probable that he was. And, upon this statement, the appraisement of those negroes was *postponed*. But, it does not appear that Sylvanus Gregory abandoned his intestate's title to the said slaves. But, on the contrary, on the 10th of June, 1807, he exhibited his bill in the county court of Prince George, against Mary Gregory, (who, it seems, then claimed the slaves as her's,) and P. Bland, administrator of Morrison, claiming to set up, and have confirmed, the report of division aforesaid, (which was exhibited with the bill, and which had not before been returned to the court.) Mary Gregory answered : and, referring to the answer of P. Bland, she insisted that the *slaves in question*, (that is, those assigned to Gregory and wife,) belonged absolutely to her ; and that her title was clear, after Morrison's debts were paid ; and that Stith Gregory never did consider, that any legal division was made. Bland answered, and objected to the confirmation of the report. 1. Because neither S. Gregory, nor his representative, had executed to him the bonds directed by the decree aforesaid ; and that an indemnifying bond was necessary, as claims against Morrison's estate were in a course of legal prosecution, and insisted upon holding on the said slaves, until he was completely indemnified. 2. Because the division was unjust and unfair, and the most valuable property assigned to Gregory and wife : that the negroes were hired out by him, for 1804 : that a few days before the hiring expired, Gregory, without his knowledge, unlawfully possessed himself of the said slaves, and carried them before the commissioners, and caused them

to be divided without his knowledge, in his absence and without notice to him, and when the infant, Ann Morrison, was not represented: that the report had never been returned: that he would earlier have taken exception to the report, if it had been returned, and had often applied at the office, for a copy of the report; and that the commissioners had long ago, (the answer was sworn to, September 22d, 1807,) been apprised that the report was exceptionable, and in all probability, held it up for reconsideration, and to give him a fair hearing before them, which never took place. During the pendency of this suit, John Marks intermarried with the widow of Stith Gregory, in October, 1809, and entered into a marriage contract with her, in relation to the negroes in question, which were in her possession; the particulars of which contract, are immaterial in this cause. Three depositions were taken on the part of Marks in this cause: That of *William Harrison*, who testifies that Stith Gregory gave him no notice of the division; the materiality of this evidence, is not perceived: That of *Edward Marks, jr.* one of the commissioners, states, that he knows of no notice given to Bland, of the division, that no report of the division was ever returned to court by the commissioners, but that since the death of Stith Gregory, he had seen the report in the hands of Sylvanus Gregory, his administrator: That of *James Dunn*, another of the commissioners, states, that Peter Bland was not present at the division, nor does he know that he was notified, nor that the report of the division was ever returned. Nothing more was done in this suit, and Sylvanus Gregory died in July, 1810.

In September, 1811, William Harrison qualified as administrator *de bonis non* of Stith Gregory, and on the 8th day of May, 1812, sued out his *subpoena* in the Richmond chancery, against Nathaniel Marks, administrator of John Marks, and Peter Bland, administrator of Thomas Morrison, which was duly served. Before the bill was filed,

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Nathaniel Marks died, and administration *de bonis non* of *J. Marks*, was committed to *Edward Marks*. The bill was filed in July, 1813, against *Bland*, administrator of *Morrison*, *E. Marks*, administrator of *J. Marks*, and *Ann*, the then infant daughter of *Morrison*, stating the original suit, decree, and division aforesaid, and claiming all the negroes mentioned in the said report of division, except *Robin*, (who was probably dead,) and also the said dower slaves: that the commissioners actually delivered the said slaves to *Stith Gregory*, and that the division was fair and equal; and prays for discovery of the increase of the slaves, and an account of profits against *Marks*, the administrator of *Marks*, who had held the said slaves, and hired them out from year to year. To this bill, *E. Marks*, administrator of *J. Marks* demurred, because, if the plaintiff had right, he had a legal remedy; and answered, that his intestate and his representatives, had been in possession of the slaves for more than five years, and insists on the statute of limitations. He denies, that the commissioners delivered the slaves to *Stith Gregory*, and assigns as a reason for that belief, that the administrator of *S. Gregory* did not take possession of the negroes; relies upon the pendency of the original suit, (in which no order of abatement had been made,) as a bar to this suit; relies, that *P. Bland*, the administrator, withheld his consent to the delivery of the negroes, till a refunding bond was executed: and that the commissioners, therefore, refused to deliver the possession to *S. Gregory*: that *Gregory* never did execute the refunding bond: that the complainant immediately after the death of *S. Gregory*, (when, however, he was not the representative of *S. Gregory*.) hired out the negroes as the property of *Mary Gregory*, until her intermarriage with *Marks*.

Peter Bland answers, and admits the division to have been made, and to have been fair and equal, and waives every exception to it; but insists upon the payment of the 129*l.* 5*s.* 6*d.* with interest; and on such payment being

made, but not otherwise, he consents to the prayer of the bill being granted. The defendant Ann Morrison intermarried pending the suit with James Young, and they answered (she being then an infant) objecting to the original division, and to the administrator, Bland, suffering the slaves to be divided in an unusual manner, and to go out of his possession without endeavouring to prevent it, into the possession of those indebted to the estate, without taking from them any security.

A. B. Spooner, attorney for Young and wife, filed a paper signed by him as attorney aforesaid; waiving in their name all benefit to be derived from the division in this cause, provided, the division made by the commissioners be decreed to stand, and be binding; and stating "it is not their desire to dispute the right of Stith Gregory to the slaves, which he had in possession."

In September, 1817, this suit abated by the plaintiff's death: and in November, 1817, the suit was dismissed, by what authority does not appear, but probably by that of James Young, who had taken administration *de bonis non* of Stith Gregory, as to James Young and wife: and process to revive against James Young, administrator *de bonis non* of Stith Gregory, was awarded. There is no order of revival.

The following depositions were taken in the cause:

Thomas Cocke proves, that W. Harrison demanded the slaves of E. Marks, jr., in January, 1813.

Benjamin Harrison proves, that Stith Gregory died, January 8, 1806: that he engaged to live as an overseer for S. Gregory, for the year 1806, removed to the plantation on the 16th of December, 1805: that he was then in possession of the slaves allotted to him in the division of the 1st of January, 1805: that he said they were his property, and wished to sell two of them, Mary and Winney, for a particular purpose: that Sylvanus Gregory died in July, 1810: that the negroes remained on the plantation throughout the year 1806: that the plantation

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was the property of Mrs. Gregory, in her own right ; that the negroes were not appraised at the appraisement of S. Gregory's estate ; but that was postponed, because he stated to the appraisers, that Bland had stated to him, that, in his opinion, the division was unfair ; and that he should move the court for a new division.

Alfred Wilkins proves, that he hired one of the slaves in question, in 1808, from William Harrison, as agent of Mrs. Gregory.

William H. Harrison proves, that the report of division was not returned to court until June, 1807 : that he believes that S. Gregory was in possession of the slaves assigned to him and his wife, and is positive as to one, *Milley* : and that the plaintiff demanded of the defendant, Marks, the slaves in January, 1812.

James Dunn, one of the commissioners, proves, that the slaves assigned to Gregory and wife, were left in Gregory's possession, and remained in his possession, and under his control, 17 or 18 months, and were considered as his property until his death : that the division was made at the plantation on which Gregory resided, and on which Morrison had resided : and that he does not recollect, that the commissioners gave the possession of the slaves to S. Gregory.

Upon the hearing of the cause, the chancellor dismissed the bill, because as Stith Gregory, in his life-time, failed to perform the *conditions*, on which a division of the estate of Theodorick Morrison was directed by the decretal order of the county court of Prince George, with the assent of the administrator, he had not such a possession of the negroes in question, as to authorise his administrator, to claim them against his wife, who survived him ; because the plaintiff's remedy, if any, was at law ; and because his claim was barred, by the statute of limitations.

From this decree, Young, administrator of Gregory, appealed to this court.

This court has so frequently affirmed the jurisdiction of a court of equity, to entertain a bill for the recovery of

slaves, when a discovery of the increase of female slaves, after a considerable lapse of time, and an account of hires and profits of a stock of slaves, where some of them may have been young and chargeable, that I do not consider the question, as to the jurisdiction of a court of equity in such a case, to be open to argument and enquiry. Indeed, some of the cases go so far, as that they can be hardly justified on any other ground, than that a court of equity is the only tribunal, which can give a competent relief, by giving the property in kind, to the party entitled; which is not effected directly by a judgment in detainue, but can only be enforced by a *distringas*, and against an obstinate or insolvent defendant. That remedy would be unavailing, to the purpose of restoring the property to the owner, and a *ca. sa.* could be resorted to, only upon superseding the *distringas*, and taking a judgment for the alternate value.

I think, therefore, that the court had jurisdiction. Nor do I think, that the remedy of the representatives of Stith Gregory was barred by the statute of limitations. Stith Gregory died the 8th of January, 1806; his first administrator died in July, 1810, before the statute of limitations had barred his remedy, since the adverse possession commenced after his death. His second administrator qualified in September, 1811, and instituted this suit, in May, 1812; within one year after his qualification, which was well within the equity of the statute. (a)

It remains, therefore, to examine the merits of the case; and in doing so, a critical attention to the facts of the case is necessary.

The decree of Prince George county court, of December 11, 1804, did not make the execution of the bond for the 129*l.* 5*s.* 6*d.*, and the usual refunding bond, a condition precedent to the execution of the decree, in respect to the *division* and *allotment* of the slaves. That part of the decree directing such bonds to be given, was substan-

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(a) Old B. C. of 1792, chap. 76, sec. 10. 2 Saund. 63, n. notes.

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tive and independent of the rest, and the division might well be made, without regard to it; and the property, if taken possession of by S. Gregory, in pursuance of the division, might have been subject to the future order of the court, if he failed to give the bonds when required to do so by the administrator; or, the administrator might have withheld the possession of the property, until such bonds were given; but in any of those cases, the partition would not have been vacated, and the specific slaves assigned to Gregory and wife would have continued to be theirs; and in whose hands soever they were placed or remained, the hires and profits of the slaves would have been theirs; and, if any had died, it would have been their loss, if the partition were equal, and finally confirmed. The failure, therefore, to execute the bonds, did not, of itself, vacate the partition, or intercept their right (legal or equitable, it is immaterial which,) to the specific slaves assigned to them. It is true, that whilst their perfect right to an undivided portion of the slaves, could not have been affected by any after-proceedings in the cause, their *inchoate* right by the partition to the specific slaves assigned, might have been (for any good cause arising out of the manner or inequality of the partition,) disturbed by the subsequent proceedings, in the cause, and other slaves assigned to them. This partition was made under such circumstances, that the guardian of *Ann Morrison*, the infant, might have caused it to be set aside, if he could have shewn it to be unequal or improper in any degree. But, the administrator certainly could not have questioned the partition, merely because the bonds were not given. By virtue of this partition, Gregory took possession of the slaves allotted to himself and wife, in her right, claiming them as his own, adversely to Bland, and all the world; and held and used them as his own, peaceably, and without any objection from any quarter, as long as he lived. Bland acquiesced, without objection or complaint, in any way or to any one, in this partition and

possession during Gregory's life ; and never demanded of Gregory to execute the bonds directed by the decree to be given to him by Gregory.

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That Gregory held such possession, cannot be questioned. That it was adverse, appears from this, that he claimed and used them as his own, and proposed to sell some of them ; and he did not hold them by Bland's permission, or under any condition, by agreement of Bland : For, Bland says, he acquired the possession wrongfully, and does not pretend, that afterwards any terms were agreed upon as to the continuance of the possession. Bland does not say, nor is there any evidence to shew, that he ever required of Gregory the execution of the bonds ; and it is equally clear that Bland acquiesced in this partition and possession, and considered them rightful and binding during Gregory's life-time. He does not say, that he had objected during Gregory's life-time. It is true, he says, that he long since (that is, before September, 1807,) notified the commissioners, that he should object to the division, and had frequently applied at the clerk's office, for a copy of the report. But, all this might well have happened, consistently with his answer, after Gregory's death ; and the proofs and circumstances of the case prove, that the fact was so. No person, who is examined in the cause, ever heard of any objection until after Gregory's death. Two of the commissioners are examined ; neither of them hints, that he ever heard of any such objection ; and one of them considered the slaves as Gregory's, as long as he lived. And the conduct of Bland forbids the supposition, that he urged, or even entertained in his own mind, any such objection. For, whilst he states that Gregory got possession of the slaves from him improperly, and that the division was unjust, and that the bonds were of great importance to him, he took no step to remedy those wrongs before claiming the negroes so improperly taken from his possession and control, or to correct the partition, or to procure the bonds during Gregory's life-time ;

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all of which might have readily been done in a summary way by applying to the court. His communication to the overseer of Gregory, that he objected to the division, and would move the court for a new division, was after S. Gregory's death. I say so, because such a construction (the time not being ascertained by the deposition,) corresponds with the other facts of the case; because the overseer was employed by S. Gregory, only a short time before his death; and, until after Gregory's death, had no doubt but that the negroes were his. I think I am justified in saying, that Bland assented to the partition, and Gregory's possession, in the life-time of the latter, and until after his death. But, after Gregory's death, the objections, now insisted on to his title, were first thought of; and, I think, merely for the purpose of securing, if possible, to Mary, the daughter of Gregory, through her mother, the slaves in question. That this was really the object, is verified by the fact, that whilst Bland opposed to the administrator of Gregory his pretended rights and interests, he never took any measure whatever to enforce them, against the property in the hands of Mrs. Gregory. No sooner do the claims of Marks interfere with this object, than, for the sake of Gregory's family, he renounces, in favour of them, all those claims and rights, except the claim for money due him out of the fund in dispute; and swears directly in opposition to his former answer.

And here it ought to be observed, that none of the allegations of the answers in these several causes, can be considered as evidence against the plaintiff, since they are not responsive to the bills, and are unsupported by proof. Thus there is no shadow of proof, to justify the assertion, that the partition was unequal, or in any way objectionable. But, the conduct of all the parties justifies a contrary belief. There is no proof, that the commissioners failed to return the report, because of any objection made by Bland, to the division. On the contrary,

if we believe Bland, he expected it to be returned ; and the paper being in the hands of Gregory's administrator, and it not appearing to have been procured by him, from any of the commissioners, it is fair to conclude, that the report, when signed, was left by the commissioners in Gregory's possession ; which is the usual practice in similar cases. And it was not returned, in consequence of Gregory's mere negligence, as is common in cases of friendly partitions. It is also remarkable, and verifies the conclusion, that all the objections to the partition, urged since Gregory's death, were thought of, for the first time after he died ; that when Bland informed the overseer, that he thought the division was unfair, and that he should move the court for a new division, he did not hint that he had any objection to the division, because the bonds, required by the decree, were not given, but only because the division was unequal ; and now he affirms, that the division was equal, and only claims to have a remedy against the negroes, for the 129*l.* 5*s.* 6*d.* ; not insisting even on the refunding bond.

This possession so acquired by Gregory, after his death, came to his widow, by the accident of the slaves being employed upon a plantation which was her's ; and, upon her marriage with Marks, came to him, and has passed to his administrator, uninterrupted either by the claims of Morrison's administrator, or daughter. This possession has continued in the same right, as it commenced ; for, it is the partition only, which gave any colour of right to hold or claim the specific slaves so assigned either to Gregory or his wife, or her second husband, or his administrator. Nothing has been done to procure to any of them, a new or better right ; no compromise with *Bland* or *Ann Morrison*, or her guardian, or husband, is pretended. *Bland's* answer to *Sylvanus Gregory's* bill, negatives that idea ; and *Mrs. Gregory* in her answer to the same bill, strongly insists upon a title, not to an undivided portion of the slaves of *Morrison*, but to the identical slaves so held by

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her under that division, and claimed by the bill. The declaration in her answer, that Gregory did not consider the division as binding, is no evidence; and is not proved, but rather disproved. And now Marks insists for the support of his title upon the same facts, which, if they give any title at all, gave it to Gregory. In short, he claims and enjoys the very title and no other, whether it be good or bad, which Gregory acquired.

Upon this state of facts, the question arises, whether Mrs. Gregory's interest in the slaves of her former husband Morrison, vested in Stith Gregory?

I should hesitate long, before I could determine, that the possession of a husband of his wife's interest, in a subject to which she was entitled, in common with others, under a partition made by virtue of an interlocutory decree, gave him no title, until the report of the partition was confirmed, and a final decree pronounced; and that, whether the partition was valid and ought to be confirmed, or objectionable and should be set aside, for any cause; or, whether a condition of paying money for equalizing the partition, were annexed to such partition, or that a bond of indemnity was to be given; neither of which, may have been paid or given. The consequences of affirming such a principle, would be extensively mischievous. Nothing is more common, than friendly bills and answers, in the county courts, for partition; and when the partition is made by commissioners, all that is interesting to the parties to be done, being done, no further care is taken by any party, upon the subject. No report is returned, or, if returned, not acted on for years, as the chancery docket, in those courts, is hardly ever called. The parties take the property assigned to them, and rest satisfied. Upon such partitions, money is frequently directed to be paid by one of the distributees to another, for equalizing the partition; which, as the sums are generally small, and parties nearly connected, is sometimes not paid at all, or paid after a great length of time. In all cases

of administration, a refunding bond is of course directed by the decree; but, this is seldom asked by the executor or administrator, or given by the distributee; the circumstances of the estate, not making it desirable. If the husband's right to his wife's distributable proportion of a common fund so situated, were suspended, until the decree was made final, and the partition confirmed, (and until that time it is in all cases possible, that the partitions may be varied,) or until he paid the money charged upon her proportion of the property, or gave a refunding bond, as the decree required, then a large proportion of the slave property in Virginia ought immediately to change hands. Purchasers must restore the slaves and their increase, purchased from husbands in such circumstances; creditors must be defeated, and the representatives of the husbands must restore the slaves to the wives, or their representatives. And the statute of limitations cannot avail in such cases; for, whilst the suit slumbers for a quarter of a century, on the county court docket, it protects all rights against the statute of limitations.

The case of *Wallace vs. Taliaferro*, has no application to this case, further than to ascertain that a husband's representatives cannot claim against his wife, surviving him, her slaves, unless he has reduced them to possession. *Wishart*, if he had any possession in that case, had it as executor. As executor only, could he take them in the first instance; and, taking possession in that character, his possession must so continue, until changed by some act, shewing that he elected to hold in his character of husband; a decision, in strict conformity to the English decisions on that subject. But, in this case, S. Gregory claimed to possess as husband, and had no color of right to possess in any other character.

This title may have been infirm, and liable to be impeached by Morrison's administrator, or his daughter: but they have never impeached it, by asserting any claim to the property, and now expressly confirm it; and it is

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not competent to any other, to question it. As against all others, and especially wrong-doers, it was valid, and sufficient to sustain an action of detinue. An actual possession is sufficient for that purpose, (even a *naked bailment* without interest,) as against strangers, and persons having no shadow of title, and wrong-doers. It is not competent to Mrs. Gregory, or her last husband, *Marks*, to set up the right of Bland and Ann Morrison, which *they* have abandoned, against the claim of Gregory's representative; since Marks claims, or at least came to the possession of, the property, and has heretofore continued in possession of it, under Gregory's title, such as it was, and no other.

If a wife's property were in the possession of another, and the husband, instead of proceeding to recover the possession by legal means, were to take it by force of arms, although as a wrong-doer he would be answerable for his wrong, yet I presume such a possession would vest his wife's interest in him. If a wife had an interest in common with others in personal property, and the husband forcibly took possession of all, although he would be censurable for such wrong to the other tenants in common, I suppose his wife's interest would vest in him. If, in the partition of a joint fund, in which a *feme covert* had an interest, a fraud were practised by or against the husband, or an error be even committed, which would justify the setting aside the partition, and decreeing a re-partition, after the husband's death, I should suppose that this re-partition would be for the benefit of the husband's representatives. A possession wrongful as to others, may well have the effect of vesting the wife's interest in the husband.

If it were thought proper to consider the rights of the parties, as they stood at the time of Stith Gregory's death, such an examination would not vary the result, to which the foregoing view of the case tends. It may be said, that the suit being instituted by husband and wife, in right of the wife, upon the death of the husband, the suit did not

abate as to the wife, and could only be prosecuted in her name ; and that the husband's representative could not, by any means, make himself a party to the cause. To this it may be observed, that it is true, that the representative of the husband could not be made a party, by a *scire facias* to revive, or by a mere bill of revivor ; yet, if any thing had occurred, which gave the husband a right to the property as against the wife, and the proceedings in the cause were in such a state, that his representative could not avail himself of that right by the ordinary proceedings to revive the suit, he might well avail himself of it, by original bill, in the nature of a bill of review and supplement ; which is the precise course pursued in this instance, and a course familiar to the English books of practice ; and the necessity of which has frequently occurred in England, in similar disputes, between the representatives of a deceased husband, and the wife surviving him. So that the question, whether the representatives of S. Gregory could avail themselves of the proceedings in the original cause, in aid of his title, acquired by the possession of the slaves in question, depends, not upon the question, whether that original suit could be revived in the name of that representative, but, upon the previous question, whether Gregory had in effect acquired such title. And if, in looking to the rights of the parties, as they were at the time of S. Gregory's death, it should be thought that Bland's acquiescence, without objection, in Gregory's possession, during the life of Gregory, a period of more than a year, was not a sufficient evidence of his virtual consent to the partition and possession of the property ; yet, his after-conduct, up to the present time, a period of sixteen years, which has been entirely consistent (I speak not of his inconsistent and contradictory declarations,) with such a presumed assent, and utterly inconsistent with the pretensions set up, but not pursued, by him, after Gregory's death, may well be resorted to for the purpose of shewing the *quo animo* (if I may use the

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expression,) of the acquiescence aforesaid, in Gregory's life-time.

If the rule of the English chancery, (founded upon the mere practice of the court,) could be considered as the law of Virginia, (as to which I give no opinion,) to wit, that a court of equity will not assist a husband to get possession of his wife's equitable interests, unless, upon his making a reasonable settlement upon the wife, I should think that the rule could have no effect in this case, because the subject is still in the power of the court, so far as to enable the court to make such a provision, if a proper case were made for that purpose. The English decisions are to this effect: That if, before suit brought, the trustee pays or delivers to the husband, as husband, the wife's equitable fund, the court cannot reclaim it, or subject it in the hands of the husband, or his assignee, to the wife's equity. If the husband, or his assignee, cannot obtain the fund, without suit, then the wife's equity attaches upon the property; the extent of which equity depends entirely upon the circumstances of the case, and may not exist at all; as, if the husband had already made an equivalent provision for the wife, and if the trustee puts the husband, as husband, or his assignee, in possession of the fund pending the suit, the wife's equity follows the property into the hands of the husband, or his assignee. But, it will not divest the title acquired by the possession, except so far as may be necessary to charge upon it a reasonable settlement on the wife, or any legal or equitable right of any other party. The possession of the husband, to give him a title, must be as husband, and not as trustee or executor. I need not refer to the authorities on these points, which abound in the English books; but, will refer only to the case in 12 Vesey, mentioned at the bar. There a trustee held the fund, the interest of which was payable to the wife's mother for life, and, after her death, was to go to the wife. He voluntarily paid the fund to the husband, who agreed to pay, and did pay as long as

he lived, the interest to the tenant for life, and his executors paid the interest in like manner, after his death : in a contest between the wife surviving and the representatives of the husband, it was adjudged, that the husband's representatives had a title to the fund in question.

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I think upon the whole, that as Gregory was in actual possession, claiming in right of his wife that possession, whether rightful or wrongful, as to *Bland* and *Ann Morrison*, vended his wife's rights in him, as between his representatives and her husband *Marks* ; and that Gregory and his representatives, were entitled to all the benefit which should arise from such possession ; and in this case, the title was absolute, until it was controverted effectually, by suit, by those who alone had a right to object to it.

If I am right in this, then the original suit in the county court of Prince George, and which abated as to *S. Gregory* by his death, was no impediment to the prosecution of this suit, since that suit was no longer depending, as to the only party who had a right to claim any relief in it. Nor was it necessary that *Mrs. Marks*, if alive, or *Young* and wife, should be parties in this suit, as they have no interest in the only question arising between the representatives of *Gregory* and *Marks* ; nor can their rights be in any way affected by the division. I should, therefore, be for decreeing the slaves, and their increase and hires to *Gregory's* administrator, if he was a plaintiff in the cause. But he is not. The suit has never been ordered to stand revived as to any one ; and the process was *against*, and not in *favour of* *Young*, administrator of *Gregory*. The decree ought therefore to be reversed, and the cause sent back, that it may be properly revived in the name of *Young*, administrator *de bonis non* of *S. Gregory*, against *Marks's* administrator ; and against *Bland*, who (although not a necessary party,) being made a party, ought to be paid the debt and interest, which he claims out of the property in litigation.

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It is admitted on all hands, that the slaves belonging to the estate of Theodorick Morrison, and which were in the hands of Peter Bland, his administrator, were to pass, after the payment of his debts, to his three children, subject to his widow's life-estate in one-third of them; and that, on the death of two of those children, she became entitled, as one of their distributees, to one-third of them, in absolute property, the other two-thirds passing to the surviving child, subject to her life-estate in one-third of them. In this situation, the slaves being hired out by the administrator, who had not closed his administration, or made distribution thereof, Mrs. Morrison, the widow, intermarried with Stith Gregory.

Shortly after this event, to wit, in December, 1804, a friendly bill and answer were filed in the county court of Prince George, wherein the rights above stated are alleged in the bill, and admitted in the answer by Peter Bland, the administrator, in that character, and as guardian *ad litem* of the surviving child, Ann Morrison; and a division of the slaves, according to the claim in the bill, was agreed to by the administrator, *on condition*, that the complainants would give bond, securing to him the payment of 129*l.* 5*s.* 6*d.*, which it was alleged was due to him from the female plaintiff, for purchases made by her at the sale of the said Morrison's perishable estate, beyond her share of that estate, and would also give a refunding bond to secure the administrator, agreeably to the act of assembly. An interlocutory decree was thereupon pronounced, appointing commissioners to divide the slaves into three equal parts, and to *allot* one part to Gregory and wife, in absolute property, and the remaining two-thirds to the infant, subject to dower, which they were directed first to *allot* and *set apart* to the said Gregory and wife, in right of the wife, during her life. And it was further decreed, that Stith Gregory should give bond and security for the 129*l.* 5*s.* 6*d.*, and also a refunding bond.

It appears from the testimony in the cause, and the answer of Bland to another bill hereafter to be noticed, that Gregory and wife resided at this time on a plantation belonging to the wife ; and that the slaves, subject to the division aforesaid, had been hired out by the administrator, Bland, for the year 1804 ; that they were brought to the plantation aforesaid, by Stith Gregory, and were there brought before three of the commissioners, on the first day of January, 1805. Those commissioners signed a paper of that date, in which they state, that they had, on that day, pursuant to the decree, allotted and set apart to Gregory and wife, one-third of them, in absolute property ; to wit, Phillis, and her five children, Dick, Billy, James, Mary, and Winney ; *Robin, old Frank, jun'r.*, old Peter and Milley ; and had also allotted and set apart to them, during the life of the wife, one-third of the residue, naming them.

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The division being thus made, the whole of the slaves, as I understand, remained on the plantation, in possession of Gregory and wife, during the year 1805, and until the death of Stith Gregory, which happened on the 8th day of January, 1806.

The commissioners never made a report of their proceedings, probably for the reasons hereafter stated, nor was any thing else done in this suit, until the death of Stith Gregory as aforesaid.

Benjamin Harrison, a witness, says, that he was employed by Stith Gregory as overseer, for 1806, and entered into his service in December, 1805. He is asked, if Gregory was then in possession of the slaves allotted to him in right of his wife under the decree aforesaid, and whether he exercised ownership over them. He says, he was in possession of them, and said they were his property, and wished to sell two of them, to wit, Mary and Winney ; that Stith Gregory died in January, 1806, and that the negroes remained on the plantation, during the year 1806, without interruption.

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Sylvanus Gregory, it appears administered on the estate of *Stith Gregory*, but at what time is not shown. But, these slaves were not taken possession of by the administrator, or appraised as a part of his estate, and this witness being asked the reason why, states, that *Peter Bland* had told him, that in his opinion, the division was unfair, and that he should move the court for a new division, and this the witness stated to the appraisers. Whether the whole of the slaves, which were of the estate of *Theodorick Morrison*, remained on the plantation, or only those allotted to *Gregory* and wife, does not appear. They were all there at the allotment; no delivery was made by the commissioners who had no right to deliver them, but having made the allotment, left them where they found them. There is no proof, that any of them were ever taken possession of by *Bland*, after the allotment. On the death of *Stith Gregory*, those thus allotted to him and his wife, were either his property, and ought to have been taken possession of, by *Sylvanus Gregory*, his administrator; or, the right to a fair dividend, as claimed in the bill aforesaid, or a confirmation of that already made, survived to the wife, such survivorship not being taken away by the decree and proceedings aforesaid, or that right passed to the administrator of *Gregory*. It is stated in the answer of *Marks* in this suit, that this right was claimed by, and in behalf of the wife; and that even the present complainant, *Harrison*, then acting as her agent, claimed them as her's, and hired them out for her benefit; and a witness, *Alfred Wilkins*, proves, that in 1808, he hired one of them from complainant, as agent of *Mrs. Gregory*, and gave his bond to her.

Thus situated, the wife claiming by survivorship against the administrator of the husband, they continued until June, 1807, when *Sylvanus Gregory*, administrator of *Stith Gregory*, filed his bill in the county court of *Prince George*, in which he refers to the proceedings in the suit

by Gregory and wife aforesaid; alleges, that the report had been signed by the commissioners, but that Stith Gregory had died before it was returned and confirmed; and prays, that it may now be received and confirmed in the same manner, and have the same validity, as if it had been done in the life-time of said Gregory, &c.; thus claiming the right to the slaves so allotted, as part of the estate of his intestate. This report, which the commissioners never had returned in the suit to which it belonged, and which suit was then depending, not having even virtually abated by the death of the husband, unless this claim of the administrator is well founded, is made an exhibit with this bill, having been obtained, whether properly or not, may perhaps be worthy of consideration, from that commissioner who had the custody of it.

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To this bill, the administrator, Bland, and Mary Gregory, the widow, are the only defendants.

There is no allegation in this bill, that possession had been delivered to Stith Gregory, except that it states that the commissioners proceeded to make distribution as directed by the decree. It is filed solely on the ground, that the report ought now to be received and confirmed in this suit, so as to have the same effect as if Gregory was alive. It is, therefore, a bill brought simply to carry into effect an interlocutory decree made in the other suit, on the ground, that the husband's rights having attached to the subject, his rights, and not those of the wife, were now to be enforced; and, consequently, that the suit, by husband and wife, must be considered as abated, there being no right surviving to her which could continue its existence as to her.

Had the right, and consequently the suit, survived to the wife, the report ought to have been returned by the commissioners in that suit, to be excepted to, confirmed, or rejected, and another division ordered, as to the court might seem proper; and even if a just division was made, it would only be confirmed, and possession delivered, so

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as to divest the possession and title of the administrator, on his getting the bonds directed to be given in the decree. Even had the report been returned by the commissioners, either before or after the death of Stith Gregory, and filed in that cause, shewing that they had finally decided the matter confided to them, it would not have been confirmed, and possession delivered, until the bonds were given; but, in reality, no report has ever been returned, and perhaps never finally agreed on by the commissioners; and, until returned, I apprehend, cannot be considered as a report made, to any court; so that it may be well questioned, whether the suit of Gregory and wife is to be considered as standing in any other or better plight than it stood, when the interlocutory decree was pronounced, and as if no division had been attempted by the commissioners.

To this bill, however, filed by the administrator of Stith Gregory, as aforesaid, without ever making the infant distributee a party, but considering the allotment final as to her, Bland, the administrator of Morrison, and who was guardian *ad litem* of that infant, in the suit by Gregory and wife, answers. He says, that the division alleged to be made by the commissioners, ought not to be established. 1. Because, neither the bond to secure to him the 129*l*. 5*s*. 6*d*., nor the refunding bond, had ever been executed to him by Stith Gregory; and which 129*l*. 5*s*. 6*d*., is now necessary to pay debts and charges. 2. That he had hired out the slaves; and that a few days before the year expired, Stith Gregory, without his knowledge, unlawfully possessed himself of them, and had them divided, in an unjust manner, in his absence, and without notice to him, having the prime and most valuable slaves assigned to his wife: that he would have filed his exceptions sooner, but the report never was returned, and he never had a view of it until the day before his answer, viz: 21st September, 1807: And the commissioners, being long before apprised of his objections, had pro-

bably held it up for consideration, and to give him an opportunity to be heard. That, since the interlocutory decree was entered, claims have come against him, as administrator of Morrison; which, if supported, will make it necessary for him to hold on upon the slaves; and, therefore, they ought not to go to the creditors of Stith Gregory. He also submits, whether the infant, Ann Morrison, ought not to be a party.

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In June, 1808, Mary Gregory, the widow, files her answer. Being not so well informed on the subject of controversy as Peter Bland, she refers to his answer as a part of her's. She insists upon her absolute right in the slaves, after the debts of her first husband, Morrison, are fully discharged; and that Stith Gregory, in his life-time, never considered any legal division had taken place.

Some of the commissioners are examined in this case, who say they do not know that Bland had notice when the division was made; that he was not present, and that they never returned their report. One of them saw it in possession of Sylvanus Gregory, the administrator.

Sylvanus Gregory died in July, 1810, and of course this suit abated.

In May, 1811, Wm. Harrison is appointed guardian of Ann Morrison. In September, 1811, Wm. Harrison, I presume the same man, takes administration *de bonis non* of the estate of Stith Gregory. And, in May, 1812, instead of reviving the suit last mentioned, he institutes this one in the chancery court of Richmond, against Nathaniel Marks, administrator of John Marks, and Peter Bland. In his bill, he takes no notice of the suit brought by Sylvanus Gregory, as aforesaid. He sets out the friendly bill, answer, &c. in the case of Stith Gregory and wife. He alleges, that the commissioners allotted the negroes, as directed by the decree, and *actually delivered* the share allotted to Mrs. Gregory, to her husband, who continued in possession for eighteen months: that, after his death, Mary, his widow, intermarried with John Marks; and

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though a marriage settlement had been made between them, renouncing, by him, all title to her estate, yet, he had got up that paper and destroyed it, and set up a claim to the negroes allotted to her, as her absolute property; that, as the division was a *fair and proper one*, and was prevented from being confirmed by the omission or carelessness of the commissioners, in not returning their report, and as they had delivered the slaves to Stith Gregory, and as the claim of Marks is out of the question, not only because of the marriage agreement, but because the report of the commissioners, if *at all effectual*, vested the property in Stith Gregory, he prays that an attested copy of that report may be received, and established in like manner, as if it had been confirmed in Stith Gregory's life-time. He makes Ann Morrison also a party, if the court thinks her a necessary party; prays for a discovery of the issue of the slaves, a delivery of them by Edward Marks, administrator *de bonis non* of John Marks, Nathaniel having died before filing the bill, and an account of hires, &c.

It is not stated, whether *Mary*, the wife of John Marks, formerly Mary Gregory, survived her last husband, or not, or whether she is now alive, or whether she left children, either by Marks or Gregory. Neither she nor they, if alive, are made defendants.

This bill claims, that the commissioners allotted, in absolute right, Phillis, and her five children, Dick, Billy, James, Mary, and Winney; old Frank, old Peter, and Milly. But the commissioners' report mentions *Robin*: whether he afterwards died, and when, or whether this is a mistake in the report, does not appear; nor is there any thing stated on that subject. It is probable, he died after the alleged division.

Edward Marks, administrator *de bonis non* of John Marks, demurs to the bill, because there is a clear remedy at law. He also relies on the act of limitations; and, for further answer, says, that there was a marriage settle-

ment, as alleged in the bill ; does not believe the slaves were delivered by the commissioners, or they would have been taken possession of by the administrator of Stith Gregory, whereas they were retained by his widow : submits, whether the court will take jurisdiction of a cause which is depending in an inferior court, of competent jurisdiction ; and that any person claiming benefit under the interlocutory decree of Prince George court, ought to resort to that court : believes, that Peter Bland withheld his consent to the delivery of the slaves to Stith Gregory, until a refunding bond was given, which has never been given ; and that the commissioners, therefore, refused to deliver them : that, from the death of Stith Gregory, until the intermarriage of his widow with John Marks, the complainant, as agent for Mrs. Gregory, always claimed the slaves as her absolute property, and constantly hired them out for her benefit. In an amended answer, he states that the marriage contract is found. That contract is filed, and bears date in October, 1809 ; speaks of a marriage about to take place : that she is possessed, in her own right, of a number of slaves, as by the list annexed, (there is no such list,) and that a portion of them, notwithstanding the marriage, is to be, and remain her property, and to be disposed of as she thinks proper ; others to be for their joint benefit during life, and then to be his property. She then conveys to Edward Marks and Nathaniel Marks the following negroes : Phillis, Dick, Billy, Milly, Winney, and Sally, and their increase, &c. (five of whom are the same names mentioned in the commissioners' report, and are probably the same slaves, and Sally may be a child of one of them.) They are to be held in trust for husband and wife, during their lives, and then one moiety of them as she shall appoint by will or deed ; and, in default thereof, to her children, in equal portions, and the other moiety to his children, in equal portions. Now, if these slaves were her's, and if she is alive, she has the use of them ; if dead, and she

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left children by Stith Gregory, or Marks, or both, those children, together with her daughter, Ann, by Morrison, have a claim under the contract, and are, therefore, interested in settling this question, whether the property was her's, or not ; and yet, neither she, if alive, nor her trustees, or her children, by Gregory or Marks, are parties to this suit. Her children, if any, by Stith Gregory, may be interested, if he did not die much in debt, that the whole slaves should go to his administrator, as that in fact would be giving them the slaves ; but, otherwise, if they would be taken to pay his debts. How this is, or what claim they will make, we know not.

Ann Morrison intermarried with James Young ; and he and his wife file their answer. They object to the division, as being without authority, or consent. They submit, whether the proceedings in the suit referred to in the bill can be of any validity, and whether the interlocutory decree is binding, as they conceive it was made without authority, or consent. They consider themselves materially interested in the decision, and expect their rights to be protected. They state, that a marriage settlement was made by Marks ; and conceive it was made as well for the benefit of the said Ann, as for the other daughter of Mary Gregory, (so it would seem she probably has a daughter by Gregory.) The respondent, Ann, says she is still under age. They blame Bland, as administrator, for not rendering any account, or making any settlement of the estate, and for suffering the slaves to be divided in an unusual manner, and to go out of his possession, without endeavoring to prevent it, into the possession of those indebted to the estate, without taking from them any security, &c.

This answer is sworn to in October, 1816, in Petersburg, though they say they reside in North Carolina.

There is a paper thrown in, but without date, by A. B. Spooner, attorney for Young and wife, in which they waive any benefit from the decision in this cause, provided,

the division made by the commissioners be confirmed. Is it competent for an attorney to waive or release the interest of his clients, insisted upon in their answer, more especially of a feme covert, and she an infant? (b) Can this paper, therefore, be noticed?

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Peter Bland, the administrator of Morrison, answers this bill. He admits the proceedings in the suit of Stith Gregory and wife, says *now* he believes the division *was fair and equal*, though made in his absence; and, therefore, waives every exception, which he might otherwise have thought it his duty to make; nor does he think it material, that it was not returned in the life-time of Stith Gregory; but says, that the *terms on which he, as administrator, agreed to the division, were, that he was to be paid about 129l. 5s. 6d., of which no part has been paid; and this was made a condition in the decree, and he insists on the payment of this sum, with interest, or that a sufficient number of the slaves, be sold to pay it. On this payment being made, he has no objection, as far as he is concerned, to the prayer of the bill, but not otherwise, because it would be unjust to give the plaintiff the benefit of a decree, without performing the just conditions on which alone that decree was rendered.*

This answer is sworn to the 13th January, 1815.

William H. Harrison, a witness in this case, proves, that the report of the commissioners was filed with the bill of *Sylvanus Gregory*.

James Dunn, one of the commissioners, says, that to the best of his knowledge, *Phillis* and her five children, *Dick*, *Billy*, *James*, *Mary*, and *Winney*, old *Frank*, old *Peter*, and *Milly*, were allotted to *Stith Gregory* and wife, as their absolute property, and were left in his possession, and remained in his possession sixteen or eighteen months, (but it is proved that he died about a year after,) and until his death, were considered as his property: (*Mobin* is omitted by him, and his name is in the

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report:) That the division was made on the plantation, where Morrison died, and where Gregory and wife lived, and that no possession was given to Gregory by the commissioners. In May, 1817, the suit abated by plaintiff's death; and at November rules 1817, *was dismissed, as to James Young, and Ann his wife, as defendants, and scire facias awarded to revive against James Young, administrator de bonis non of Stith Gregory.* I presume it was intended to revive it in his name. There is no order to revive the suit in the name of Young, nor any proceeding after he is recognised as the administrator *de bonis non* of Stith Gregory, except the taking of Dunn's deposition.

The parties named in the caption of the decree when the cause was finally heard, were James Young, administrator, &c. of Stith Gregory, plaintiff, against Edward Marks, administrator, &c., and Peter Bland; but in fact, there was no plaintiff, and the suit had never been revived.

This case, then, presents this extraordinary spectacle. On the death of Stith Gregory, and for a long time after, the right in her portion of those slaves was claimed by the widow as surviving to her. That claim was asserted, on her behalf by Harrison, who hired them out as her's. It was asserted by Bland, the administrator of her former husband, and guardian *ad litem* of his infant. It was also asserted by Young and this same infant, his wife, co-distributees with her; and yet this same Harrison, as administrator *de bonis non* of Stith Gregory, filed this bill to disaffirm her rights. Bland contradicts his former answer, and is willing to surrender her rights, if he himself is made safe, *but not otherwise*; still insisting on the *invalidity of the proceedings, as to himself and Young*, is now actually the plaintiff, though not regularly so, asserting a claim against the alleged interest of himself and wife, in their answer in this suit, which in fact, is dismissed at rules as to them, not by order of the court, so that that interest is not now before the court. It may be, that

Mrs. Marks is dead, and that she left no children by her last husband, who are interested in asserting her rights, or their own, under the marriage contract; and that her only children may be Mrs. Young, and a daughter by Gregory, and that by some arrangement between them, it may be now most to their interest, that the administrator of Gregory should recover; but this court cannot enter into views of this kind, if they exist. We must take up the subject at the death of Stith Gregory. If the property was so reduced to possession by him, that no right survived to his wife, the case is at an end. The affirmative of this proposition, however, it appears to me, cannot be decided in the situation in which the cause now stands, as to parties. If the negative of it, however, can be maintained, it is not necessary to enquire as to other parties, as in no event can the plaintiff prevail.

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On the marriage of Mary Morrison with Stith Gregory, her rights in the slaves of her first husband were those stated in the bill filed in Prince George court; and we must enquire into the effect of the proceedings in that court, on those rights.

The courts of equity in England, have adopted a course of decision in regard to the equitable interests of *femes covert*, by directing settlements to be made by the husband, which, as yet, have never been acted upon by our courts. Whether they ever will be, is not for me to say at present; if it is, or may be a legitimate and proper course of decision, we ought to do nothing that may impair it. It is not necessary, however, to resort to the principle in question, in the present case, although that principle will tend to explain some of the cases referred to, in the argument. Thus, in a short case in 3 Br. C. R. 362, it is said, that if money be ordered to be paid to the husband in right of his wife, and he dies before payment, it will be ordered to be paid to his executor. This, I apprehend, was a case similar to that in 4 Ves. 15, in which it is said, that if a settlement is reported, approved and ordered by the

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court, it ought perhaps to be binding, notwithstanding the death of either party, before it is carried into effect; but, it is there expressly laid down, that, if it has not been *approved*, the right survives to her. Or, this case may have been one, arising under the doctrine laid down in 2 Ves. senr. 677, where it is said, that if the action vests after marriage, the husband may dissent to the wife's interest, and recover in his own name; and *such recovery*, is equal to reducing to possession. But, there the general doctrine is also explicitly stated, that if in such case, he sues in the name of husband and wife, the judgment will be, that both recover, and then the surviving wife, and not the executor of the husband, shall have the *scire facias* on the judgment.

The general doctrine is also laid down in Co. Litt. 351, in the note, that if *Baron and feme* have a decree for money in the right of the wife, and then the Baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband.

From all this, it results, that where there is a suit, by husband and wife, in right of the wife, even if there is a judgment or decree, but the money or thing not received under it, it survives to the wife, except, in *England*, where the husband may have been delayed by reports, &c. As to settlements, if those arrangements are *approved*, they then assume something of the nature of contracts, the wife is generally examined by the chancellor, and they are afterwards confirmed in favor of the husband. But, when there is no final judgment or decree, the wife is not even put to her *scire facias*, or new suit; for, the suit does not abate by the death of the husband. But, it may be said, that the property being left in possession of the husband, as aforesaid, this either actually or virtually abated the suit as to both, on the death of the husband: that, if it was not actually abated as to the wife, and she had gone on to have the division confirmed, or to have had a new one made, (which must necessarily have been the result,

on an exception by Bland, as administrator and guardian *ad litem*, stating that he had no notice of the division, and that it was ex-parte and unequal,) yet the executor of the husband could have filed his bill to prevent the widow from going on with the suit, or to have the benefit of the decree that might be made in it, in the same manner as if the husband were alive.

I doubt exceedingly, whether this could have been done. I think certainly it could not, according to the course of decision in England.

The general doctrine laid down in 4 Ves. 19, is, that an assignment, even by the husband, of the wife's equitable interest (which is one mode by which he may reduce her legal rights to possession,) will not bar the equity of the wife. It would be strange if it did, since the decisions at law, that the husband cannot maintain an action there for a legacy due to his wife, for that would totally defeat the wife's equity; an assignment, therefore, of such equity, will not put the assignor in a better situation than the husband is in at law. It must, of course, survive entire to her. But, the possession in this case was at most a social possession, even if only those slaves set apart for the wife remained in his possession; for, until the final decree produced a severance, he could not claim any individual slave as the property of his wife. Suppose any of them had died, either of those allotted to the wife or the child, after the alleged division, and before it was confirmed, must there not have been a new division, so as to make the division just at the time the decree was made, and the title vested? This probably happened as to Robin. It must also be considered a fiduciary possession; otherwise, it would be a fraud on the decree, and on the administrator, whose title and possession were not divested by this proceeding. He was to be secured in a large sum of money, and to be further indemnified, before he would assent to part with his possession, and before he could be deprived of it even by the court; and he even

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now claims to *hold on* upon them. He could have sold them for payment of debts, and the purchaser would have held a good title, and the court would have enjoined the husband, if he had attempted to prevent such sale. But it would have been far otherwise, if the husband had acquired title in the property, by the voluntary surrender or distribution thereof by the administrator; or, if they had been vested in him by the final decree, on his giving the bonds required.

In these cases, the administrator could not sell the property itself, his title being gone, but he must resort to the husband for indemnity, in case of after-debts, &c. The title, then, was not in the husband, but in the administrator, (I apprehend it could not be in both,) and unless the court would permit the proceedings of the husband, *under their decree, to operate a fraud on that decree, and on the administrator*, his possession must be considered the possession of the administrator, or of the commissioners, until final decree, and bonds given. It may be said, that Bland, the administrator, did not make fresh pursuit and claim, and, therefore, waived his right: When he made known his dissent to the division, does not appear, probably very soon, as otherwise the report would have been returned; but the property was in the custody of the law, his title could not be affected by the proceedings of the commissioners, or Gregory under the decree, and no one pretended to interfere with the property, except under the decree, and subject to it. Indeed, never having seen the report, he might well have thought it improper to interfere, until it was returned to court; and as he has, at all times, insisted on the payment of the money due to him, and as about this time, other claims were coming against the estate, his willingness that the title should pass from him, before these matters were provided for, can be presumed. Suppose the husband had, on the next day after this alleged division, dismissed the suit, and sold the slaves, would the purchaser have taken a title in them as

the wife's property reduced to possession by him? I think not, but that the administrator could have recovered them from the purchaser, and then, on the death of the husband, nothing further being done, they would surely have survived to the wife. If the division, and retaining the possession after it, did not instantly vest the title in the husband, but was then in the administrator, for the purposes of paying debts, and distribution, when did it vest in the husband? And even, if he had dismissed the suit as aforesaid, or had never brought one, but had got possession of all the slaves, as husband, would this vest a title in him? *For*, although the wife had an interest in the whole of them, yet until a division was made, she had no right to any individual or individuals of them; how then could the husband reduce to possession as *her property*, any particular portion of them? Had they all been delivered over to him by the administrator, to hold them on behalf of his wife, and her child, to whom they belonged, the administrator thereby divesting his title, yet in this case, he would hold no particular portion of them as *her's*, which he could sell, and I doubt whether in this case he could bring a suit in his *own name*, without joining his wife, for a division: if he could not, and I can find no case justifying an opinion that he could, then certainly his executor could not. But if he could, that is a very different case from the one before us.

Here the suit is to get possession, and to get it in severalty, and he dies before they are severed. His rights must be considered as at the time of his death; they cannot become stronger by posterior acts of any of the parties. If the right and suit survived to the wife, she had a right to a final division and allotment to her as survivor: if she and her daughter agreed to let the former allotment stand, or if she held that portion allotted to her, until her daughter came of age, or some other division was demanded, it does not follow that she is to be considered as claiming under her husband. Her claim

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to them as her property, surviving to her, was at all times asserted from the moment she could make such claim, and she cannot be deprived of that title, by her daughter's failing to assert a right to any other division, or now abandoning her right to it. This abandonment, too, if the attorney could make it, is only made *on condition*, that the division in question should stand, so as to enure to Stith Gregory's administrator. It is in these words: "The defendant Young, and wife, waive all benefit to be derived from the decision of this case, *provided, the division made by the commissioners, shall be decreed to stand, and be binding.* It is not their desire to dispute the right of Stith Gregory to the slaves which he had in possession." Signed by their attorney.

Can this conditional abandonment vary the rights of the parties, as they stood at the death of Stith Gregory? Suppose that abandonment had not been made, could we say that this division, made *ex-parte*, and never returned, must stand good against one who is not only an infant, but a *feme covert*? and if this court shall not think proper to decree *according to the terms stipulated for* in this paper, what is to become of the rights of this party, and how is she again to be brought into court? Can the abandonment of the rights of the wife by the administrator, although formerly asserted in her favor, change the nature of those rights? But, even he too abandons them, only on proviso that he can be secure himself. This strange shifting of the scenes, I perhaps might account for, were I behind them. It may be, that there is some apprehension that the creditors of Marks, in consequence of the marriage settlement not being recorded, may take the property; or, that if Gregory's administrator recovers, a division may take place, between his daughter, and Ann Young, more advantageous to them than they can expect, under the marriage agreement; but, how Gregory's creditors can recover, until all parties claiming under that agreement, are before the court, I confess I cannot see.

If, upon the filing of the bill of Sylvanus Gregory, and the answers thereto, the court had taken up the original cause to which they referred, and had set aside the report, as being made *ex-parte*, and *without notice*, had re-committed the division to the same, or a new set of commissioners, and had finally made division between the mother and daughter, upon the mother securing the debt due from her to the administrator, Bland, &c., and had dismissed the bill of Gregory's administrator, ought such decree to have been reversed here? I think not; or, if that suit had been revived by the administrator *de bonis non*, as would have been the regular course, in order to carry on that claim, and such final decree had been pronounced in the first suit, I think it ought not to have been disturbed. This course, doubtless, was not pursued, because Bland, who was a party to that suit, had answered, and would hardly have been permitted, had he been willing to file a new answer, expressly contradicting his first. The wife also would have been a party.

But let us suppose, that the slaves of the wife had been of less value, than the debt due from her to Bland, could she or Bland have sued Gregory's administrator, to compel him to take those slaves and pay that debt, to indemnify Bland the administrator, further than that, and to the extent of any thing else, which the wife may have received, as she did receive something else, from the personal fund? But, Gregory must have done this, even if the property had been of less value, had the decree been made final in his life-time. But this debt, and the right to this indemnity, survives, I presume, against the wife. The bonds which would have placed these responsibilities on the husband, were never given; and if the title vested in the husband without them, are they now to be given by his administrator; or, is he even bound to pay this debt due from the wife, out of Gregory's estate? How is Bland to be secured? If the title is in Gregory, he may follow the assets perhaps, for the payment of the debts of his intes-

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tate; but can he follow them for a debt due to himself, from the wife of his intestate? And if he can, and fails, can he recover of her after depriving them both, by this shifting of character, of the fund from which it ought to be paid? The administrator of Gregory, has neither offered to pay this debt, or to indemnify; and from the pointed manner in which Bland insists on this, without which *he will not consent* to a decree in his favor, I suppose this is a matter which has not been arranged amongst them. If it had been foreseen to be a difficulty in the way, doubtless it would. But, can the court compel the administrator, to give his individual bonds, or apply these assets, to the payment of this debt? There may be debts of superior dignity to be first paid.—These doubts, if there is any thing in them, may tend to shew, that the bonds provided for in the decree, were *necessarily* to precede the change of title in the property; and that the rights of the parties are not to be decided by posterior events, or waivers, or agreements of some of the parties; but that the inquiry in fact is, what decree ought to have been pronounced in the original suit, on the facts and under the circumstances existing at the death of Stith Gregory? How far a possession by a husband, under an interlocutory decree, agreed to, and acquiesced in by an executor and administrator, and all parties concerned, shall be considered a reduction of the property to possession, so as to vest it in the husband and his representatives, will be proper for consideration, when such case is presented.

On the whole, though not without some difficulty, arising from the involved and perplexed state of the case, I think the decree must be affirmed.

Judge CABELL was of opinion, that the decree should be reversed, and Judge BROOKE was of opinion, that it should be affirmed. The court being divided, the decree of the chancellor was affirmed.

The following was entered as the decree of the court.

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The court, not approving of so much of the chancellor's decree, as disclaims jurisdiction on the ground, that the plaintiff ought to have sued at law, is of opinion to affirm the decree.

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Shearman, administrator, &c. *against* Christian and others.

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Where an executor is sued in chancery, for a subject which is in part personal to himself, and in part touching his executorial character, he ought not to be compelled to give an *appeal bond* for the latter, as the subject is covered by his official bond.

This was an appeal depending in this court, and a motion was made by the appellees for a rule upon the appellant, to give bond and security in a further sum, for prosecuting the appeal. The following opinions, contain a full statement of the case.

*March 22.*—Judge GREEN.

The decree, appealed from in this case, was in part personal against the appellant, for the amount of rents of land, and hire of slaves, received by himself, since the death of his testator, and which land and slaves were held by his testator in his life-time, by colour of a deed

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and will, which were set aside on the ground of fraud, in procuring them; and as to so much of the decree, the appellant has given bond and security upon the appeal. The residue of the decree, was for the amount of the rents and hires of the said slaves, and the price of personal property, embraced in the said deed and will, received by the appellant's testator; and as to that subject, the appellant was decreed to pay out of his own estate, because upon making up an account of his administration, it was found that he had assets of his testator, sufficient for that purpose.

The appellees now move, that the appellant be ruled to give an appeal bond with security, as to so much of the decree as is founded on the liability of his testator.

It was said by the court in *Sadler, &c. vs. Green*, (a) that "executors and administrators, are not bound to give security on an appeal, because they give it when they undertake the administration of the estate;" and in *Wilson vs. Wilson's administrator*, (b) the same rule, in general terms, was laid down, excepting the case of a judgment for a *devastavit*; and for this further reason, that such bond and security by the executor, would make the debt his own, though he may not have done any thing improper, and was only seeking to do justice to the testator's estate. The same rule in substance, was asserted in *Duncan vs. Robins*. (c) Another reason might have been added, that to require bond with security by executors, upon appeals from judgments or decrees, founded upon a demand against the testator, would frequently prevent an executor from seeking relief against an erroneous judgment or decree, which, however ruinous to his testator's estate, might not affect his individual interests. It is, therefore, that the court has decided, that the statutes requiring bond and security upon appeals, &c. although general in terms, apply only to persons appealing, &c. in

(a) 1 H. &amp; M. 26.

(b) 1 H. &amp; M. 16.

(c) 2 Munf. 341.

their own right. A judgment for a *devastavit* is against the executor in his own right, and for his personal wrong, and does not involve any question touching the rights of the testator, or of his estate, and therefore, on an appeal, security should be given. A decree against an executor, bottomed on a claim against his testator's estate, although it directs the payment *de bonis propriis* of the executor in consequence of sufficient assets in his hands to be administered, still affects the testator's estate. And for such a decree, the securities for the executor's administration are responsible. He should not, therefore, in such case, be required to give bond and security upon an appeal.

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Judges COALTER and CABELL, concurred.

Judge BROOKE dissented, and delivered the following opinion.

Judge BROOKE.

I am not satisfied, by the reasons assigned in the opinion just delivered, that the record exhibits a case in which the rule, so long established by this court, ought to be departed from. That rule required security in all cases in which the judgment or decree against an executor or administrator is personal, as in the present case; and on good reason. Every judgment or decree against an executor or administrator *de bonis propriis*, implies a mal-administration of the assets, until the contrary appears. It is personal to the party, and it becomes his interest to reverse it. It might happen, that in the case of a judgment for a *devastavit*, there were still assets to discharge it, yet security on the appeal would be required. So in the case before the court. But, the judgment in one case, and the decree in the other, implies the contrary; and general rules are made for cases which most frequently

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happen. While, on the one hand, the oath of the executor or administrator is some security that he will appeal in any case in which the interest of the estate is involved, though required to give security; on the other, if it be entirely dispensed with, he may frequently appeal, to the injury of his sureties in the bond for his administration, and to the great delay of just creditors.

I am, therefore, of opinion, that security ought to be required in this cause; but, as there is a majority of the court of a different opinion, the motion is overruled.

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### Garland, &c. against Loving, &c.

In what cases, and under what circumstances, a court of equity will direct the sale of the real estate of infants. (See Rev. Code of 1819, vol. 1st, pages 409, 410, from the 16th section, to the 23d inclusive.)

This was an appeal from the Lynchburg chancery court. Spotswood Garland and John Whitehead, guardians of the infant children of James Loving, and Samuel Loving, and Lunsford Loving, exhibited their bill and amended bill, against the said James Loving and his wife, and the said infant children, together with Robert Kincaid, Solomon Matthews, and Nathan Lofftus. The bills were regularly answered, and proofs taken. The suit was heard by consent, and the chancellor dismissed the bills with costs. The case was as follows:

On the first of June, 1816, the defendant James Loving, being indebted to the defendant Nathan Lofftus, in two sums, viz: \$ 2,000 and 1784 $\frac{1}{2}$  for the purchase money of a

tract of land, in the county of Nelson ; and the plaintiffs Samuel and Lunsford Loving, being bound with the said James, as sureties for the payment of the said money, the said James conveyed the said land to Robert I. Kincaid, and Solomon Matthews, in trust to indemnify the said Samuel and Lunsford, against the consequences of the said suretyship, and gave power to the trustees or either of them, to sell the land, *whenever the said sureties should pay, or become liable to pay, the said money.*

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Afterwards, on the 24th of August, 1819, the said James Loving, being desirous to provide for the support of himself, his wife and children, for the education of his children, and for their advancement after his death, conveyed the same tract of land to the complainants, *Lunsford and Samuel*, in trust for the support of himself and wife, for the schooling and raising of his children, and after his death, for his children in fee.

On the 25th of October, 1819, the said James Loving, by another deed, conveyed to the same *Samuel and Lunsford*, other property, being all that he had, in trust, for the support of his wife and children, with an authority to sell for the payment of the debts of the said *James Loving*, and to appropriate the proceeds, at the discretion of the trustees, to the education and support of the children, and to the support and maintenance of the wife.

On the 31st day of January, the said *James Loving*, being considerably in debt, owing to the said *Lofftus* among others a considerable sum of money, and part of the purchase money, of the first mentioned tract of land, between \$ 700 and \$ 800, being yet due, for which the said *Lunsford and Samuel* were then liable ; the whole amount of the said *James Loving's* debts, being upwards of \$ 4000, and the whole value of the fund, exclusive of the tract of land aforesaid, held by the plaintiffs *Lunsford and Samuel*, not much exceeding in fair value, \$ 5000, and being certainly not more than adequate, if forced into market, to pay the debts then chargeable upon it ; the plaintiffs were



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reduced to the alternative, as they believed, of selling all the last mentioned fund, and leaving nothing for the support of the said *James* and his family, but the tract of land aforesaid, or of selling the said tract, paying the debts out of the proceeds of the sale, vesting the residue in some valuable property, and applying it with the other fund, to the purposes of the trust. The defendant *Lofftus*, was willing to give the sum of \$ 10,000, for the land, which was deemed an excellent price; and the plaintiffs united with *James Loving* in a contract, by which they agreed to sell the said land to *Lofftus*, for the above sum. The plaintiffs being advised, that they could not make a good title without the aid of a court of equity, (as the rights of infants were concerned,) and the contract with *Lofftus*, being considered by every judicious man, as the most advantageous that could be made, and manifestly for the benefit of the infants, filed a bill, and amended bill, in the Lynchburg chancery court.

The objects of the bills, were; 1st, to have the contract with *Lofftus* ratified, and the proceeds applied, under the direction of the court of chancery, to the objects of the trust: 2ndly. If that could not be done, then that another sale of the land should be authorised: 3rdly. If neither of these objects could be effected, then that the trustees *Kincaid* and *Matthews*, should be directed to sell the land under the trust deed to them.

The infants answered by a guardian *ad litem*, appointed by the court. The adult defendants also put in their answers. All of them assented to the prayer of the bill.

Depositions were taken, shewing that the interest of the infants manifestly requires the confirmation of the sale, and if that cannot be done, a re-sale of the said land.

The chancellor dismissed the bill, and assigned the following reasons.

I. As regards the rights of the infants, he does not consider the case as coming within the act. 1. Because

the bill had not been treated as one within the act, as the counsel did not mention to the court, the object of the bill, when the guardian *ad litem* was appointed, and the court, therefore, did not take the precautions required by the act. 2. Because the infants having a father alive, who is their natural guardian, the appointment of other guardians by the court was irregular. 3. Because the infants had nothing but an equitable interest in the subject, which would not accrue to them, till after the death of their father.

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II. As it regarded the relief sought by the plaintiffs, *Lunsford* and *Samuel*, in a sale of the land by the trustees, *Kincaid* and *Matthews*, he thought there was no necessity to come into his court, because the trustees had a clear authority to sell, and were willing to exercise it.

From this decision, the plaintiffs appealed.

*C. Johnson*, who was counsel for both parties, submitted the case without argument.

*March 25.*—Judge COALTER, delivered the opinion of the court.

The court is of opinion, that this is a proper case for the consideration of the superior court of chancery, under that part of the act of assembly, concerning guardians, orphans, &c., which prescribes the mode by which a guardian may procure a sale of the real estate of his ward; and that if any thing occurred in relation to the appointment of the guardian *ad litem*, or in other respects, which was not satisfactory to the chancellor, so that, in his opinion, further proceedings were necessary to enable him to pronounce a decree on the merits, the bill ought not to have been dismissed, but such further proceedings directed.

The court is further of opinion, that in exercising his jurisdiction, under the act aforesaid, the chancellor is

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necessarily confined to the objects pointed out by the act, to wit: to decree a sale of the property of the infants, provided, it manifestly appears to be their interest, that such sale should take place, and that the rights of others, will not be violated thereby; and finally to direct and secure the investment of the fund for their benefit, in such manner as to the court may seem best. That part of the bill, therefore, which seeks to apply the proceeds of the sale to the exoneration of James Loving's personal property, from the debts by which it is probably bound, for aught that at present appears in the record, is not necessarily connected with a fair and proper sale of the land.

Should the decree, directing the investment of the fund, authorise its being invested, to a given extent, in any species of property belonging to the said James Loving, it will be for the consideration of the court, and those executing such decree, whether it will be advisable to invest it there, or not.

As to those whose rights are not to be violated by the decree; the court is of opinion, that in relation to the creditors of the said James Loving, either prior or subsequent to the execution of the deed of the 24th of August, 1819, if there be any such, who may hereafter be enabled to charge this land with their debts, such charge must of course continue to exist against the fund arising from the sale thereof; and the decree ought to provide, that the fund so raised and invested, is to stand charged with the debts of the said Loving in like manner as they would have been charged on the land aforesaid, had these proceedings never taken place: and it may, therefore, be worthy of the consideration of the chancellor, should an investment of any portion of the fund in personal property be decreed, and James Loving shall hold any such property, which can be acquired on fair terms, whether it will not be proper to invest it there, and to provide that the consideration shall be paid to his creditors, in exoneration of any possible charge by them on the said fund;

and in like manner to apply the proceeds of the property conveyed by the deed of the 21st of October, 1819, to the discharge of those debts, if necessary, or to invest that also, as a portion of the fund belonging to the *cestuique trusts*; subject, in like manner, to debts as aforesaid.

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As to the rights of James Loving, in the trust property, and the contingent dower interest of Nancy, the wife of said James, the court is of opinion, that a sale of the property, subject to the latter, might greatly deteriorate the price, and probably ought not to be made, unless she will unite in the conveyance, at least on such terms as to the court may seem proper, considering her interest still secured to her as a *cestuique trust*, under the deed and decree. And that James Loving must also unite in any sale and conveyance that is made.

As to any others who may possibly come into being, or who may be interested in the property, at or before the death of James Loving, other than those now before the court, it is possible that their interest will be most effectually guarded and benefited, by those proceedings which may be found necessary, for the interest and protection of those now before the court, and who claim an immediate interest in, and a right to maintenance and education, out of the profits of the estate. Those parties are the presumptive, ultimate *cestuique trusts*, and are entitled to the immediate aid and protection of the court, so far, as that can be properly extended to them. They are the more especially entitled thereto, inasmuch, as if nothing is done to change the situation of the property, it cannot be foreseen how far creditors, up to the time even of the death of James Loving, may come in upon it, so as finally to defeat the rights of every one. But, nevertheless, the court is of opinion, that no sale can be made, except subject to the rights of such future possible claimant. It will, therefore, be for the consideration of the chancellor, whether a fair and proper sale of the property, can be made under that condition, subjecting the fund, to be invested as

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aforesaid, to the purchaser for his indemnity, against any  
such possible claim, of all which he will judge, before the  
said sale and arrangements are finally closed.  
If under all these circumstances, a sale, manifestly to  
be in the interest of the infants, can be made, this court thinks  
it will be proper to decree the same, taking care that the  
proceeds thereof shall be properly invested and secured  
for the use of the cestuique trusts, according to their rights  
as they now appear, or may hereafter appear, or of any  
future cestuique trust, who may be entitled under the deed  
aforesaid, with liberty to the parties, from time to time, to  
apply to the court for further directions.

The court is further of opinion, that unless the chan-  
cellor shall be satisfied, that it is necessary to appoint  
another guardian *ad litem*, or to take other steps to satisfy  
himself, that the interest of the infants, manifestly re-  
quires a sale of the estate as aforesaid, or should he ulti-  
mately be so satisfied, it will be competent for him, in-  
stead of directing a sale by his decree as aforesaid, to  
confirm that already made to *Nathan Lofftus*, under the  
terms and conditions aforesaid, provided he is willing to  
abide thereby, and James Loving, and Nancy his wife,  
are also willing to unite in the conveyance, and to invest  
and secure the proceeds thereof, as aforesaid, in the same  
manner, as if such sale had originally been made, in pur-  
suance of a decree of the court.

The decree of the superior court of chancery is, there-  
fore, reversed, but without costs; and the cause is re-  
manded to that court, to be further proceeded in accord-  
ing to the principles above declared.

## Stuart against Luddington.

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Where a dispute exists about the boundaries of land, and one of the parties yields his opinion, and acknowledges the right of his adversary, this acknowledgment shall not bind him, if at a future day he finds that he was mistaken, unless the acknowledgment was founded on some consideration. No concealment or misrepresentation can have the effect of barring the rights of a party, unless another person is thereby induced to part with his money, or unless the concealment &c., be so gross as to amount to *fraud*.

This was an appeal from the Staunton chancery court.

The following is the case presented by the record :

In the year 1784, *Patrick Lockhart* obtained patents for two tracts of land, one of 400 acres, and the other of 449 acres. The first was granted to him as assignee of *John Tillery*, in whose name the survey was made ; and the second, in his own right. These two tracts did not actually join each other, (as the appellee contended,) but left a slip of land between them, containing 45 acres, which was vacant. The appellee, *Luddington*, became entitled to this vacant land, before the year 1793, by regular entry founded on treasury warrants. *Lockhart* having contracted to sell a part of his 449 acre tract to *Reider*, a survey was made by the county surveyor, in company with *Lockhart* and *Luddington*, when *Lockhart* acknowledged, after some dispute, that his patents did not cover the said land which had been taken up by *Luddington* as vacant land ; and the surveyor gave it as his opinion, that *Lockhart's* patent did not give any title to the said land. The lines were run according to this idea, and *Lockhart* assented. *Lockhart* made a deed to *Reider*, without interfering with the said land. In consequence of this, *Luddington* went on to perfect his title to the said land ; and having surveyed it, sold it to a certain *Eli Perkins*, before a patent was issued for it, and made

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aforesaid, to the

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&c.  
vs.

Loring, &amp;c. th

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*Perkins was put into the*  
*possession of the said land.*  
*as the assignee*  
*of the said land.*  
*Stuart conceiving that his deed*  
*covered the said land, instituted an action of ejectment*  
*against the said Nicely, then the tenant in possession.*  
*This suit was decided in favor of the said Stuart, who*  
*turned out the said Nicely by a writ of possession.*  
*Luddington filed a bill against Stuart, Nicely and the*  
*heirs of Lockhart, praying that an issue might be directed,*  
*to ascertain what is the real boundary of the patent for*  
*400 acres; and that on the trial, the verdict and judgment*  
*in ejectment, might not be read in evidence, on account*  
*of some alleged irregularities at the trial; that Nicely*  
*might be re-instated in the land from which he had*  
*been ejected, and be paid the intermediate rents and profits;*  
*and that he might be forever quieted in his possession*  
*against the claim of the said Stuart and of the said*  
*Lockhart's heirs.*

Stuart answered the bill, relying on the judgment in the ejectment, and denied that he had any knowledge of the plaintiff having ever made a survey of the 449 acre tract, in company with *George Reider*. He declared his disbelief of the assertion, that Lockhart ever yielded his right to the plaintiff, &c.

A deposition in the cause, confirms the statement of the bill, concerning Lockhart's declaration at the survey, that his patent did not cover the land in dispute, and therefore he gave it up.

The chancellor decreed in favor of Luddington, on the ground of Lockhart's relinquishment of his claim to the land in dispute; in consequence of which, Luddington had proceeded to perfect his title, and improve the land. But as it was doubtful whether Stuart, who purchased from

Lockhart, had notice of the said relinquishment before his purchase, he directed an issue to try whether he had such notice; whether on the day of the purchase, Luddington, or any person claiming under him, was in actual possession of the said land; and whether, on that day, or at any time previous, *Stuart* had notice that the plaintiff or any one deriving title under him, claimed the land in controversy, under the entry set forth in the bill.

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The jury rendered a verdict, that on the day of the deed from Lockhart to *Stuart*, the latter had notice of the agreement set forth in the bill, respecting the relinquishment of Lockhart's claim to the land in controversy, that on the same day, the purchaser from Luddington of the land in question, was in actual possession of the said land; and that on the same day, the said *Stuart* had notice that the plaintiff Luddington claimed the land in controversy, under the entry set forth in the bill.

The chancellor made a final decree, that the land should be restored to the defendant *Nicely*, who claims under the plaintiff, to have his title quieted, against the claim of the defendant *Stuart*, and the heir of *Lockhart*; that the defendant *Stuart*, should render an account of rents, and profits, since he obtained possession of the land under the judgment, in ejectment, &c.

From this decree, the defendant *Stuart* appealed.

*Wickham*, for the appellant.

*Leigh*, for the appellee.

March 26.—Judge GREEN.

For the purposes of this cause, it must be taken for granted after the verdict and judgment at law, (which are not impeached upon any ground, which would justify the interference of a court of equity, by awarding a new trial,) that the legal title to the land in controversy, is in



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the appellant ; and so the case was considered by the chancellor. The only question in the cause therefore is, whether the alleged abandonment by Lockhart, of his claim to the land as stated in the bill, ought in equity to preclude him or his assignee with notice, from asserting the legal title. Luddington, in 1791, upon the mistaken supposition, (as it has turned out,) that there was a slip of vacant land, between two patents held by Lockhart, and which mutually called for the lines of each other, as a common boundary, located the land so supposed to be vacant. But, before Luddington had taken any other step towards procuring a grant for the land, Lockhart proceeded to survey one of his patents, with a view to a sale thereof, to Reider. Upon that survey, which Luddington attended, it was found that there was a marked corner and line, corresponding with the calls of the patent, but which did not coincide with the marked corner and lines of the other patent ; and it was the land between these lines, which Luddington had located as vacant. Lockhart stated, that the survey ought to be extended, so as to connect with the other patent, and Luddington stated, that he was willing to give up his claim to the land in question, if Lockhart's patent covered it, as he did not wish to go to any farther expense about it, if it was previously appropriated. The surveyor gave it as his opinion, that the survey ought not to be extended, and Lockhart abandoned all claim to the land in question, and completed his survey, according to the marked lines, and sold by that survey to Reider. This transaction had nothing of the character of a contract, between Lockhart and Luddington, so as to be a fit case for a decree, for a specific execution. There was no consideration passing between the parties. There was no promise to convey, and if there had been such a promise, it would not have been binding, as it would have been made without consideration, and upon an erroneous opinion of Lockhart, in relation to his rights. There was no compromise of conflicting claims. Luddington did not

even suggest, that he was willing to abandon his claim, if Lockhart claimed title to the land; but only in the event, that Lockhart's patent really covered the land; so that if the surveyor had been of opinion, that the survey ought to be extended to the marked line of the other patent, it would still have remained discretionary with Luddington, to waive his claim or not, according to his pleasure. Upon the ground of *contract*, then, the appellee can assert no right to the land in question.

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The rights of a party may be bound by, or he may be held responsible for, the consequences of his concealment or misrepresentation, or gross negligence in relation to them, (according to the circumstances of the case,) in favour of any person, who may be thereby induced to part with his money. But, no concealment or misrepresentation can have that effect, unless it be collusive or fraudulent, or the negligence be so gross as to amount to proof of fraud. (a)

In the case at bar, both parties had precisely the same information as to Lockhart's title. On his part, there was no concealment or misrepresentation. He had no intent to deceive or injure Luddington; he cannot be charged with any fraud. His abandonment of his title, as it is called, probably had no influence upon Luddington's after-proceedings, in perfecting his title; for, he had previously located the land as vacant, upon his own judgment as to the validity of Lockhart's title, and would probably have proceeded to procure his patent. If Lockhart had never abandoned his title, the case seems to be at most one of mutual error, and in which both parties are innocent; and in such case, the equity being equal, the law should prevail.

There is no charge in the bill, that any permanent improvements on the land had been made by Luddington,

(a) Pasley vs. Freeman, 3 T. R. 51. Haycroft vs. Creasy, 2 East 92. Robertson vs. Rhodes, 2 Vern. 554. 1 Fomb. Eq. 163, note (n.) Evans vs. Bricknell, 6 Ves. 183. Holmes vs. ——— 12 Ves. 279. Dance vs. Spurrier, 7 Ves. 231.

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Laddington.

or those claiming under him, for which, compensation could be asked; and, therefore, on that subject no decree can be made.

I think the decree should be reversed, and the bill dismissed with costs.

The other judges, (with the exception of judge Cabell, who was absent,) concurred; and the decree was accordingly reversed, and the bill dismissed with costs.

1893.  
March.

### Harvie and others, against Banks.

Where an agreement to make a lease is entered into upon certain terms, the party to whom the lease is to be made, cannot enforce a specific performance, unless he performs his part of the agreement, or offers to perform, and shews that he is willing and able to do so.

Where the lessee conveys certain lands to the lessor, as a collateral security for the payment of a debt to the lessor, and the lands so conveyed, are lost by the non-payment of taxes, the lessor is not responsible for the value of the lands; but the lessee was bound to see to the payment of the taxes, he having a complete equitable title to the lands.

This was a suit brought in the Richmond chancery court, by Henry Banks against Jacqueline B. Harvie, devisee of John Harvie deceased, John B. Harvie and Lewis Harvie, infant heirs of Edwin James Harvie deceased, by the said Jacqueline B. Harvie, their guardian, and William Brockenbrough, administrator of Edwin Harvie, deceased, and administrator *de bonis non* of John Harvie deceased.

The case presented by the bills, answers, &c., is in substance as follows.

In the year 1795, Henry Banks purchased of John Harvie, certain lands in the neighbourhood of Richmond, and executed a mortgage on the same, to secure the payment of the purchase money. The money not being paid, a suit was brought to foreclose the mortgage, and a decree obtained. Harvie became the purchaser under the sale ; and he and Banks entered into a new contract in writing, by which it was agreed that Harvie was to let to Banks, his heirs, executors &c., the said lands, on a ground rent, forever. The conditions of this agreement, were, that Banks should pay to Harvie, his heirs, &c. \$ 1000, on the first day of January in every year, forever, the first payment to commence on the first day of January, 1801 ; and if the said rent, or any part of it should be in arrear six months after it should fall due, and be demanded by the said Harvie or his representatives, the said Harvie, &c. might distrain for the same, or re-enter and declare the said lease forfeited and void. The parties further agree that “ when either is called upon by the other, to execute “ such deeds and writings for the performance of their “ respective covenants, as may be recommended by any “ two practising attornies, and provided either party shall “ fail to execute accordingly, it shall be in the power of “ the other party to cancel, and totally acquit himself “ from this contract, by giving notice of his intentions “ and reason to the opposite party, in writing.”

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Some-time afterwards, Banks obtained an act of assembly, to lay off a town on part of the said lands, and erected, or caused to be erected, a mill on the same ; which mill, and a part of the said land, were sold by Harvie, with Banks's approbation to Ladds and Price, and the payment was made by them to Harvie ; in consequence of which, the said rent charge was reduced to 200*l.* *per annum*, and an admitted balance of 300*l.* This balance was more than discharged by payments made by Banks to the amount of 371*l.*

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John Harvie died, leaving by his will, the lands in question, to Edwin and Jacqueline Harvie; the former of whom is since dead intestate, leaving two sons John and Lewis.

Banks made a written demand on Jacqueline Harvie, and others interested, of a lease; on the making of which, he offered to pay *one year's rent of the premises*, and to enter into engagements to submit all matters of difference to the judge of the court of chancery; but these propositions were not acceded to.

Banks further alleged, that Harvie was indebted to him for the value of 1000 acres of military land, in the State of Kentucky, which were to have been sold for the benefit of the said Banks, by agreement between him and Harvie; but which were lost by non-payment of taxes, by the neglect of the said Harvie. He further stated, that he purchased from the said Harvie, some years before, 11,600 acres, in the county of Harrison: that although these lands by right of purchase, were the property of Banks, they were patented in the name of the said Harvie, and by agreement, are pledged as a collateral security for the debts of the said Banks to Harvie; but these lands also have been suffered to be forfeited for non-payment of taxes: that the value of these lands, will be much more than sufficient to pay all the arrears of the rent charge, and every other debt which he may owe to the said Harvie.

After the death of John Harvie, an ejectment was brought on the demise of Jacqueline B. Harvie, and Lewis and John Harvie, the sons of Edwin Harvie deceased, for the land in question, and a judgment was obtained in their favor. Banks, therefore, prayed that the said judgment might be enjoined, and that a *specific execution* of the said contract, for a lease of the said lands, might be decreed.

The injunction was awarded.

The defendants filed their answer, depositions were taken, and the chancellor decreed that Banks should be restored to all the benefits of the agreement of 1800, upon payment of all the rents due thereon, with interest from the time they fell due, &c.

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Banks.

From this decree, Jacqueline B. Harvie obtained an appeal.

*Leigh and Wickham*, for the appellant.

*W. Hay, junr.*, for the appellee.

March 27.—Judge COALTER, delivered the opinion of the court.

The court is of opinion, that the agreement entered into between Henry Banks and John Harvie, of the 26th of April, 1800, as modified by that of July 9th, 1802, mentioned in the proceedings in this cause, in relation to the lands in Henrico county, are not to be considered as amounting to an executed lease from Harvie to Banks, but a covenant to make such lease, on Banks's performing his part of these agreements; and that the said Banks, has not shewn himself entitled to claim a specific execution of the said contracts, in as much as he has failed to perform his part of the said agreement, and does not now offer to perform them, or shew that he is willing or able to do so.

The court is further of opinion, that if the said agreements could properly be considered as executed, and as passing a legal title to Banks, as that title is forfeited at law, a court of equity ought not to relieve against such forfeiture, upon the mere payment of the arrears of rent, but only on condition that Banks should perform all the stipulations in the said contract on his part to be performed, and especially pay so much of the sum of \$ 12,000, as has not been applied to making improvements on said

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March.

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lands, to be now applied to that purpose; in order that Harvie's representatives, might have an effectual security for the punctual payment of the rents, according to the intent of the said contracts. This he has not shewn his willingness or ability to perform, otherwise than by the application of the alleged value of certain lands, said to be forfeited for the non-payment of taxes by Harvie, and for which value, his representatives are also alleged to be chargeable. As to which, the court is further of opinion, that if any of the lands in the proceedings mentioned, and charged by the appellee, to have been forfeited and sold for the non-payment of taxes, have been so forfeited and lost, which does not appear, the said Harvie was in no way responsible therefor; but that the appellee was himself bound to see to the payment of the taxes, he having a complete equitable title thereto, the legal title remaining in Harvie, with his assent as a security. So far from being entitled to apply the value of this land as a fulfilment of the contracts aforesaid, by the appellee, even this collateral security for that fulfilment, and for other responsibilities mentioned in the proceedings, may be lost.

The decree of the chancellor, therefore, so far as it conflicts with the principles above declared, is erroneous, and reversed with costs. The bill of the plaintiff, so far as it asks a specific performance of the contracts aforesaid, or relief against the forfeiture thereof, and the judgment at law is dismissed, and the cause is remanded for further proceedings to be had in relation to any other matters alleged in the bill.

**Stealy against Jackson.**

1823.  
March.



The Chancellor may grant an appeal from his own decree *during the term*, with an allowance of time to the appellant to give security *after the expiration of the term*.

This was an appeal from the Staunton chancery court, where the case was decided in favor of the defendant, the present appellee. The plaintiff prayed an appeal; which was allowed, with permission to the appellant to give bond and security within thirty days.

When the case came on to be argued in this court, *Tucker* for the appellee, made a preliminary objection, that the appeal was irregularly granted, because the law did not authorise the chancellor to allow the bond and security to be given *after the term*, where the appeal was taken *during the term*. (a)

*March 31.*—Judge BROOKE, delivered the opinion of the court.

On the preliminary question, whether the appeal in this case has been regularly granted, the court is of opinion, that though the act of assembly might be susceptible of a different construction, if it were *res integra*, that which has been adopted by the chancellor, has been so long acquiesced in by this court, that it is now too late to disturb it. The cause has therefore been considered on its merits, and the court is of opinion to affirm the decree.

(a) 1 Rev. Code (of 1819,) p. 206, sec. 50, 51.



1888.  
April

## Gilliam against Allen.

A motion to reinstate an injunction on additional evidence tendered by the complainant, is in the nature of an original application for an injunction; and on the refusal of the chancellor to reinstate the injunction, an application to the judges of the court of appeals or any of them, is proper.

In this case, the plaintiff Gilliam, applied to the chancellor of the Richmond district, for an injunction, which was refused; and an application being made to the judges of the court of appeals, it was granted by them.

At a subsequent term of the court of chancery, a motion was made by the defendant to dissolve the injunction; and it was accordingly dissolved. The plaintiff then took new evidence to support his bill; and moved the chancellor to *reinstate* the injunction. The chancellor, in vacation, denied the said motion. Whereupon, the plaintiff applied to the *judges* of the court of appeals, who granted the injunction.

At another term of the court of chancery, the defendant moved to discharge the order of the judges of the court of appeals awarding the injunction. The court was of opinion, that after an injunction has been dissolved and refused to be reinstated, it is only competent to the *court* in the last resort, and not to a *judge* or *judges*, of that court, *out of court*, to reinstate the injunction, upon an appeal for that purpose. The court, therefore, for the purpose of bringing the construction of the law in this respect, before the court of appeals, discharged the said order, as improvidently made.

From this decision of the chancellor, an appeal was allowed by the judges of the court of appeals.

*Daniel*, for the appellee, contended that the chancellor was correct in his construction of the law, and referred to the 1 Rev. Code, p. 205, in support of his position.

*April 2.*—Judge BROOKE, delivered the opinion of the court.

1823,  
April.

Gilliam  
vs.  
Allen.

The court is of opinion, that the motion to reinstate the injunction in this case, on additional evidence tendered by the complainant, was in the nature of an original application for an injunction; and that on the refusal of the chancellor to reinstate the injunction, an application to the judges of this court, or any of them, was proper, under the 44th section of the act entitled, “an act to reduce into one all acts and parts of acts, concerning the superior courts of chancery,” according to the decision of this court, in the case of *Toll-bridge vs. Free-bridge.*(a)

The court is further of opinion, that the chancellor having discharged the injunction without deciding on the merits, they are not now before this court. The decree discharging the injunction on the grounds stated by the chancellor, is therefore reversed, and the cause is remanded to be further proceeded in on its merits.

(a) Ante p. 206.

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### **Fretwell against Wayt and Winn.**

1823.  
April.

Where an appeal is taken from an interlocutory decree of a county court to the court of chancery, and that court affirms the decree, and an appeal is taken to the court of appeals; the decree of the court of chancery will be considered as interlocutory.

The only question in this case was whether the decree of the chancellor was interlocutory or final.

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Fretwell  
vs.  
Wayt and  
Winn.

*Fretwell* filed a bill of injunction in the county court of Albemarle, against *Wayt and Winn* and others. The injunction was granted, and afterwards dissolved. From this order of dissolution, an appeal was granted to the Staunton chancery court, where the order was affirmed. *Fretwell* appealed to this court.

The counsel for the appellees, moved to dismiss the appeal, (the appellant having been called, and not appearing,) on the ground that the decree of the chancellor was interlocutory only; and that under the law, the appellee may call up an interlocutory decree, at any time within sixty days.

*April 5th.*—Judge BROOKE, delivered the opinion of the court.

The only question in this case is, whether the decree of the chancery court, affirming the decree of the county court, is interlocutory or final. If final, the appeal must take its turn on the docket, and cannot now be dismissed upon calling the appellant. If interlocutory only, the appellee has a right to call it up within the sixty days prescribed by the act of assembly, and it may be dismissed unless prosecuted by the appellant.

The court, upon consideration of the provisions of the act, is inclined to give it a construction, which will best accord with the obvious intention of the legislature. An appeal from an interlocutory decree in such case, was allowed by the act, to avoid expense and delay, and in order to settle the principles of the cause. The direction in the act, that the record is to be sent to this court, within two calendar months, and the appeal to be heard and determined, within sixty days, was intended to effect the same object.

If in this case then, the decree is to be considered a final decree, because it has been affirmed in the court of chancery, the provisions of the act in relation to interlocutory decrees, would be defeated.

The court, therefore, is of opinion, that the decree of the chancery court, affirming the decree of the county court, has not changed its character, and that both decrees are still to be considered as interlocutory ; and that the appellant having been called and failing to answer, the appeal is to be dismissed.

1822.

April.

Fretwell  
vs.  
Wray and  
Winn.

## Hayes's ex'or. and others *against* Bowman.

1823.

April.

Where land is conveyed which is bounded by a water-course not navigable, such conveyance carries with it the title to a moiety of the bed of the water-course.

Appeal from the Staunton chancery court. The case was in substance as follows :

*Bowman* purchased of *Hayes* and *Bumgardner*, a tract of land lying on the South river, near Waynesborough, on which there was a valuable mill-seat. The deed from *Hayes* and *Bumgardner* to *Bowman*, conveys the land to the "middle of the river." This tract had formerly belonged to *Estill*, being part of a larger tract lying on both sides of the river. *Estill* conveyed the land in question to trustees, describing it as "lying on the west side of the South river, and bounded by the river," &c. The land being sold under this deed of trust, *Hayes* and *Bumgardner* became the purchasers, and the trustees conveyed to them, to the middle of the river ; and they conveyed to *Bowman*, as before-mentioned, by the same description. *Bowman* gave his bonds to *Hayes* and *Bumgardner* for the purchase money ; which were assigned to other persons.

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April.

Hayes's  
ex'or.  
and others  
vs.  
Bowman.

Bowman applied to the county court of Augusta for leave to build a mill and erect a dam across the river ; but was opposed on the ground, that no part of the bed of the river was either in him or the commonwealth. It was contended, that although Hayes and Bumgardner had conveyed to him one-half of the bed of the river, no part of it had been conveyed by Estill to them. This controversy was depending at the time of Bowman's filing his bill.

Suits were brought against Bowman on his bonds for the purchase money, which had been assigned by Hayes and Bumgardner to various persons ; and judgments were obtained. Bowman filed a bill of injunction to arrest the judgments, and made Hayes and Bumgardner, and the assignees of the bonds, defendants. The injunction was granted.

The several defendants then filed their answers, alleging various grounds of equity, which, as they are not noticed in the decision of this court, it is unnecessary to mention.

The chancellor decreed, that the injunction should be dissolved as to the defendant *Moffitt*, (one of the assignees) the complainant having waived his equity, if he had any against him : that, as to the defendant *Ramsay*, (another of the assignees,) he must submit to whatever equity attached to his bond in the hands of *Hayes* and *Bumgardner*, the original obligees ; and the complainant being entitled to recover of them, whatever damage he may have sustained by the loss of his mill-seat in consequence of the defect of title in any part of the bed of the water-course, an issue at law was directed, to ascertain the damage which Bowman had sustained by the defect in his title to one-half of the bed of the water-course aforesaid.

The jury returned a verdict, that Bowman had sustained damage to the amount of \$2000, by reason of the defect in his title above-mentioned.

The court decreed, that the injunction as to Ramsay, should be made perpetual, and his bond for 144*l.* delivered up to be cancelled; and that the representative of James Hayes, (who had died,) and Jacob Bumgardner, should pay to the plaintiff £1,216, that being the balance of damages assessed by the jury, after deducting therefrom, the aforesaid sum of 144*l.*, with interest thereon, from the time when it was due.

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April.  
Hayes's  
ex'or.  
and others  
vs.  
Bowman.

The defendants appealed to this court.

*Call*, for the appellants.

*Leigh*, for the appellee.

It was said for the *appellants*, that Bowman had a good title to the middle of the bed of the river, and therefore, there was no ground for his injunction. The deed from Hayes and Bumgardner, conveyed to the middle of the river in express terms; and although the deed of trust from Estill described the tract as "lying on the west side of the South river, and bounded by the river, &c.," yet the principles of law would extend the conveyance to the *middle of the river*, in such a case as this. It is a well established principle, that the proprietor of land contiguous to a stream not navigable, is entitled to half the bed of the stream. (a) If it should be objected, that Estill owned both sides of the river, and only conveyed the land *bounded by the river*, the answer will be that such a conveyance, by the authorities referred to, includes one-half of the bed of the river.

In reply, it was said, that admitting the general principle, it would not embrace a case like the present, where Estill was originally the proprietor of both sides of the river, and only conveyed the land on one side, *bounded by the river*. He certainly had a right to convey as much or

(a) Hargrave's Law Tracts, p. 5. Davis's Rep. p. 152, 155. Home vs. Richard, Call's M. S. Rep.

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as little as he pleased ; and the words which he has used, are as explicit as possible, to shew his intention to convey only to the river bank.\*

April 8.—Judge CABELL, delivered the opinion of the court.†

The main question in this case, depends on the construction of the deed of trust of the 27th March, 1802, executed by Estill and wife, to Joseph Bell and others.

Where the commonwealth, having title to lands lying on both sides of a water-course not navigable, grants the lands lying on one side thereof, and bounded thereby, it is universally admitted, that such grant carries with it, the title to a moiety of the bed of the water-course. There can be no reason assigned, why this rule, so just in relation to grants by the commonwealth, should not equally apply to conveyances by individuals. If it be the wish of the grantor not to convey the bed of the stream or of any part thereof, it is easy for him to exclude it, by the use of words, proper for that purpose. In the absence of such words, the moiety of the bed of the stream, passes by the conveyance. On this principle the court is of opinion, that the moiety of the bed of the river, passed by the deed of trust aforesaid, and by the deed under which the appellee Bowman claims ; and that the said appellee, had no right to resist the payment of the bonds given by him for the purchase money. The decree of the chancellor is therefore reversed, the injunctions dissolved, and the bill dismissed.

\* Many other points were made ; but as the decision turns entirely on the general question, it is not necessary to mention them.

† Judge Brooke absent.

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An executor, against whom judgments have been obtained at law, may be relieved in a court of equity, upon his shewing that assets sufficient to pay all the debts of the estate, came to his hands, but that a large portion of them had been since recovered by a paramount title.

*Quære*, whether an executor ought not to be relieved in such a case, even if he had paid debts of inferior dignity, it appearing that he was promptly and *bona fide* paying off the debts of the estate, under the belief that he had assets sufficient to discharge every claim.

When a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is *final* as to him, although the cause may be still pending in the court, as to the rest.

This was an appeal from the Richmond chancery court. The case is fully stated and discussed in the following opinions.

*Speoner*, for the appellants.

*Leigh*, for the appellees.

*May 6.*—Judge GREEN.

The appellants, on the 4th of June, 1803, filed their bill against Gregory Johnson and Thomas Goode, who had severally obtained judgments against them as administrators of J. E. Royall. deceased, seeking to injoin any further proceedings upon those judgments, upon the ground, that since the rendition of the judgments, suits had been brought and were depending against them for the recovery of the whole estate of which their intestate died possessed, by a title paramount to his. The injunction was awarded by chancellor Wythe. Goode answered, and relied, that his debt was of equal dignity with any



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other due from the estate; and that, independent of the property sued for by the claimants mentioned in the bill, other assets of their intestate had come to the hands of the plaintiffs, sufficient to pay his debt in a due course of administration. The bill was amended, and Edwards and Moore, who had severally obtained judgments against the plaintiffs, were made defendants, and an injunction awarded as to them. The bill was again amended, and it was charged that a judgment had been rendered against the plaintiffs in one of the suits mentioned in the original bill for the slaves, from which they had appealed; and that, (if they should lose their slaves,) they had more than fully administered, and were greatly in advance for the estate.

The administration account of the plaintiffs was referred to a commissioner, who reported a balance due the administrators of 60*l.* 11*s.* 6½*d.*; that they had paid judgments and executions amounting to 721*l.*; but, that they had paid bond debts and simple contract debts, inferior in dignity to Goode's claim, to the amount of 898*l.* 11*s.* 2½*d.*; and that Goode's claim, after crediting a small payment, was 254*l.* 14*s.* 2*d.* Upon the coming in of this report, the injunction as to Goode was dissolved. At a subsequent term, the court, without reinstating the injunction, recommitted the said report to the commissioner, with directions to ascertain and report how much of the assets credited to the estate in the report, proceeded from the sales of the slaves in controversy; and from what source the residue of those assets were derived, and to state an account between the plaintiffs and the defendant Goode. In pursuance of this order, the commissioner reported that the balance due the administrators, allowing all debits and all credits, was on the 1st of September, 1808, 132*l.* 19*s.* 7*d.*; that there was credited on account of the sale of slaves up to September 1, 1808, 557*l.* 16*s.* 11½*d.*, of which 197*l.* 14*s.* 6*d.*, was enjoined; that other assets credited in the account, were enjoined to the amount of

45*l.* 9*s.* 2½*d.*; that setting off Goode's judgment against debts due by him to the plaintiffs individually, he was indebted to them 128*l.* 17*s.* 3½*d.*; and that the estate of J. E. Royall, was indebted to Goode on simple contract, in the sum of 15*l.*, with interest from the 30th of July, 1800. The account of assets, therefore, as applicable to the payment of judgments on the 1st of September, 1808, was as follows :

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Whole amount of assets, 1558*l.* 19*s.* 7½*d.*

Deduct sales of dis-

puted negroes, 557*l.* 16*s.* 11½*d.*

And assets injoined, 45*l.* 9*s.* 2½*d.*

————— 603*l.* 6*s.* 1½*d.*

Applicable to pay off debts, 955*l.* 13*s.* 5½*d.*

Paid on judgments

and executions, 721*l.* 0*s.* 0*d.*

Paid Goode's judg-

ment, 254*l.* 14*s.* 2*d.*

————— 975*l.* 14*s.* 2*d.*

Over-paid, 20*l.* 0*s.* 8½*d.*

Paid bonds and simple contracts, including commissions, and expenses of administration; which last, to wit: commissions, and expenses of administration, had a priority to all debts,

410*l.* 11*s.* 2½*d.*

Add, according to 2d

report, 72*l.* 0*s.* 8½*d.*

————— 482*l.* 11*s.* 10½*d.*

Over-paid, unless the negroes shall turn out to be assets,

502*l.* 12*s.* 7*d.*

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Upon this report, the chancellor decreed on the 21st of February, 1810, that Goode pay to the plaintiffs, the balance reported against him, with interest: That the plaintiffs pay out of the assets of their intestate to Goode, the 15<sup>th</sup> and interest, unless they shewed at the next term, that the same had been paid; that Goode's judgment, be perpetually enjoined; and that the plaintiffs, should pay to Goode, his costs.

Afterwards, Enoch Moore answered. He does not state the dignity of his claim; but says he sued in 1808, and obtained judgment; and in the next year, (notwithstanding the injunction,) he sued and obtained judgment, for a *devastavit*. He states, that he knows nothing of the situation of the estate, or of the claims to a part of it set out in the bill; but that the plaintiffs had repeatedly promised him payment. In 1817, the injunction as to Moore was dissolved. In 1816, an order was made at the rules, abating the suit as to Goode, by his death, and awarding a *scire facias* to revive against his executors; and there was afterwards an order to revive at rules against them. They appeared and filed exceptions to the commissioner's last report, the particulars of which it is not necessary to state.

Upon the hearing of the cause, the chancellor, declaring that the injunction ought not to have been granted, set aside all the orders in the cause which conflicted with what followed, and decreed that the injunctions awarded against Goode, Johnson, and Edwards, be dissolved, and the plaintiffs' bill dismissed with costs as to all of the defendants.

The first question which occurs, is, whether this was a fit case for the jurisdiction and relief of a court of equity. If the title of John E. Royall, to the slaves for which his administrators were afterwards sued, and which were recovered against them, had been questioned, before the judgments of Johnson and Goode were recovered against them, the administrators, in defending themselves at law,

must either have admitted those slaves to have been assets, in which case, they would have been conclusively bound; or must have denied that they were assets, in which case the title must have been tried in those suits; and if found to be assets, that finding must at law have been conclusive, even although the slaves should afterwards be recovered upon a title, adverse to that of John E. Royall. Or if they had, in those suits, been found not to be assets, that finding, in like manner, would at law be conclusive upon those creditors, even if they should have been afterwards ascertained to belong to J. E. Royall. In such case, there would have been no possible means of avoiding the hazard of great, and at law irremediable injustice, to one or other of the parties, but through the aid of a court of equity, by suspending the proceedings at law, until the title to the slaves in question could be ascertained, in a way which would be binding on all the world, when complete justice could be done to all parties. In such a case, where the law affords no adequate remedy, I think a court of equity has jurisdiction, upon its general principles. And this view of the subject, applies to Moore's and Edwards's judgments also, inasmuch as the title to the negroes was not settled, when those judgments were rendered, if indeed it is yet settled, which does not appear in this record. But, there is a stronger reason for supporting the jurisdiction of a court of equity, as to Goode's and Johnson's judgments, which were rendered, before the suits for the recovery of the negroes were instituted against the appellants. These judgments were, when this bill was exhibited, conclusive evidence at law, of assets against the appellants; for, the act declaring that executors should not be personally liable beyond the assets of their testator, by reason of any mis-pleading, false-pleading, or non-pleading, did not pass, until 1807. The consequence would have been, that acting *bona fide*, in the belief that they had, in their hands, sufficient assets for the payment of debts, and submitting without defence to judgments, as

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in justice they were bound to do in such case, these executors might have been bound without default or even negligence on their part, to pay the debts out of their own pockets, because of an unknown and unsuspected defect in their testator's title to a large portion of the property, which came to the hands of his executors as his, unless a court of equity in such case could give relief.

The next question is, whether, the court having jurisdiction, such a case is made out by this record, as to entitle the plaintiffs to relief. As to the judgments of Goode and Johnson, it does not appear which was entitled to priority. But, both were entitled to priority over those of Edwards and Moore. If Goode's had a priority over Johnson's, then, from the state of the accounts, (Goode's judgment being paid by the administrators,) it appears that all the assets which are ascertained to belong to J. E. Royall's estate, which came to the hands of his administrators, have been duly applied to the payment of debts of dignity superior to that of the claims of Johnson, Moore and Edwards; and the decree, as to those parties, ought to be reversed with costs, against Moore, the injunctions against those parties reinstated, and the cause remanded to the superior court of chancery for further enquiry to be made, as to the state of the assets of J. E. Royall.

As to Goode's case, it seems that the claims against him which were set off against his judgment, and upon which he was found to be indebted to the plaintiffs, were individual claims against him by them, arising during the pendency of the suit, and which were in no way put in issue by the parties in their pleadings. The decree, therefore, of Feb. 21, 1810, founded upon those accounts, was probably erroneous, unless it could be justly inferred from the record, that those matters were brought into the cause by the consent of the parties; and, therefore, if that decree was interlocutory and in the power of the court, it ought probably to have been corrected, although abstractly just. But, if final, the court could not meddle

with it, and all the proceedings in relation to it in the office and in court, subsequent to the term at which the decree was pronounced, were irregular and erroneous. I think the decree was final, and out of the power of the court below, otherwise than by a bill of review. And the question upon this appeal is not, whether that decree was erroneous; but, whether the appeal is from the decree of 1818, and not from that of 1810. I have carefully examined all the cases decided in this court, which I can find reported upon the question of the interlocutory or final character of decrees.(a) And I do not find, that where the rights or responsibilities of the several parties are perfectly distinct and several, and where a final disposition of the cause as to one with a direction as to the payment of costs as between him and the adverse party, does not in any degree affect the rights or interests of any other party; and where nothing which can be brought into the cause by any other party, or which can be done by the court as to the other party, can by possibility affect the rights or interests of the party as to whom such decree has been made, such decree has ever been considered as interlocutory; nor do the principles asserted in these adjudged cases, lead to such a decision. Without going into a detailed examination of the circumstances of those cases which are reported, it is sufficient to say, that in all of them, it was apparent, that the court intended to proceed further in the cause, and that it was necessary to do so, in order to put a final end to the controversies between the parties, as to whom the decree was made; or, that the interests of the parties as to whom a decree was made, might be affected by the further proceedings in the cause, in relation to the other parties. The only case which

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(a) 2 Wash. 300, Davenport vs. Mason. 2 Wash. 300, Young vs. Skipwith. 1 Call, 54, Grymes vs. Pendleton. 3 H. & M. 589, Eiksey vs. Lane. 3 H. & M. 136, Aldridge and al. vs. Giles and al. 1 Munf. 339, Templeman vs. Steptoe. 2 Munf. 42, Goodwin and al. vs. Miller. 2 H. & M. 558, Fairfax vs. Muse. 2 H. & M. 595, Allen vs. Belcher. 3 Munf. 29, Shepherd vs. Starke. 4 H. & M. 382, Chapman vs. Armistead. 6 Munf. 328, Alexander vs. Coleman.

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might be supposed to be in opposition to this general conclusion is, that of *Alexander vs. Coleman*, in which the judges were equally divided. But I do not think that case is opposed to this conclusion, and I should think upon the principles then asserted by judges Roane and Brooke, who considered the decree in that case not to be final, that the decree in the case under consideration, was final as to Gordon. Judge Brooke distinguished that case from the case of *Ball vs. Ball*, relied on by judges Cabell and Coalter. In the last mentioned case, a bill against several defendants was dismissed as to one of them, and remained in court as to all others. He observed, that the decree "was not final against Alexander; he had not been decreed to convey his title according to the respective interests of the parties, as prayed by the bill, nor could such a decree be pronounced, until the quantum of each had been ascertained; that the continuance of the cause as to the other parties by their consent, cannot be considered as the act of the county court; and if that were material, no costs were decreed against Alexander, which would have followed a final decree, unless for reasons which ought to have been stated in the decree he was to pay no costs;" and for these reasons, he was of opinion, that the decree was interlocutory.

Judge Roane was of the same opinion, because the first enquiry properly was, whether the plaintiffs had a right to demand partition of their father's estate, as claimed by the bill, and until that question was decided, Alexander's rights could not properly be affected; and although his rights were decided in the first instance, yet if it had been afterwards ascertained in the further prosecution of the suit, that the plaintiffs had no right, the decree against Alexander could be, and ought to have been, set aside by the same court. He also insisted, that the decree was interlocutory, because it did not direct a conveyance according to the prayer of the bill, because

no costs are decreed against Alexander, because Alexander was dismissed from the court only by implication arising from the terms of the continuance, and because he considered the question as settled by the former decisions of the court, which he thought had established the rule, that a decree could not be final unless the court had finally decided the cause in all its parts. This last assertion does not appear to me to be supported by any case decided in the court. Not one of the reasons specifically assigned for considering the decree as interlocutory in that case, applies to the case at bar. There was no decree for costs in that case ; here, costs are decreed. In that case, the court had not decreed a conveyance according to the prayer of the bill ; here, the bill praying against Goode an injunction only, the decree perpetuated the injunction, and not only gave all the relief prayed for, but went further, and gave the plaintiff what he did not ask for. In that case, it had not been ascertained that the plaintiffs had any right in the subject of controversy, a part of which was in Alexander's possession. That question was to be determined by the after-proceedings in the cause, between the plaintiffs and the other defendants ; and if it were found that the plaintiffs had no right, Alexander's possession ought not to have been disturbed ; and so Alexander's interests were still involved in the after-proceedings in the cause, and liable to be affected thereby. But in this case, the only questions were as to the amount and due application of the assets, in the hands of the plaintiffs, to the payment of their intestate's debts. Goode claiming to be a creditor, together with other creditors, was brought before the court. Goode's debt was ascertained to be paid, and he to be a debtor to the plaintiffs. No matter then, as to him, what was the state of the assets, or how they should be applied to the payment of debts. He was no longer interested in these questions ; and however they were decided between the other parties, such decision could not possibly affect

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his rights or interests, nor make it necessary or proper to vary the decree as to him. To what possible purpose then, should he be considered as remaining in court, but to witness a contest between other parties, in which he had no possible interest, whilst he might be compelled to pay the amount of perhaps an erroneous decree, without the possibility of being relieved, until the termination of a tedious litigation, between other parties, in which he had no interest? If the decree was final, Goode might have appealed, and it may be said, that if he had done so, he might have reversed the decree, and again have been thrown as a claimant on the assets; and thus have impeded the progress of the cause in the court below, as, pending such appeal, no final disposition of the assets could have properly been made; since such disposition might be ascertained to be wrong, by the event of such appeal; and that great inconvenience might arise from such a course. To this it may be answered, that precisely the same inconvenience would arise from an appeal, after a final decree, as to all the parties: and that an appeal from a decree in chancery, does not suspend the power of the court below, over the cause; and the court may still proceed according to its sound discretion, taking care not to proceed so far as to hazard any injury to the rights of any party, as they may ultimately appear. (b)

The supreme court of the United States has, by statute, appellate jurisdiction only in cases of final decrees and judgments; and, in *Ray vs. Law*, (c) it was said by the chief justice: "The court is, however, of opinion, that a decree for a sale, under a mortgage, is such a final decree as may be appealed from."

In England, final decrees in chancery bind assets in the hands of executors as do judgments at law. But, interlocutory decrees have no such effect. Thus, a decree di-

(b) *Gwynn vs. Lethbridge*, 14 Ves. jr. 585. *Wood vs. Griffith*, 19 Ves. jr. 550.

(c) 3 Cranch, 179.

recting a commissioner to take an account of the plaintiff's demand, and of the assets, being interlocutory, does not bind the assets. (d) But a decree, that the plaintiff recover of the executor a specific sum to be paid in a due course of administration, and directing an account of assets, is final, as to the recovery, and binds the assets. (e)

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Upon the whole, I am of opinion, that the decree, as to Goode's representatives, is erroneous, and ought to be reversed, with costs against them: that the cause, as to them, ought to be sent back, and all the proceedings against them set aside; and the *scire facias*, to revive the suit, quashed, as having improvidently issued; and that the appellants pay them their costs in the court of chancery.

Judge COALTER.

I think this a very strong case, requiring the interposition of a court of equity.

The administrators, having a right to suppose there were assets sufficient, were promptly paying off the debts of their intestate, without much respect to their dignity; and many debts, due by judgments against him in his lifetime, and against them since his death, as also debts due by bond and account, were so discharged, within a very short time after his death.

In this posture of affairs, a suit or suits are instituted, claiming a great portion, consisting of slaves, of what they supposed were assets of their intestate in their hands to pay his debts, and which have probably been finally taken from them. If so, it would seem pretty manifest from the accounts taken, that debiting them with all the assets which they have received, and giving them credit for no more than the debts of superior or equal dignity to

(d) 10 Ves. jr. Perry vs. Philips.

(e) Morrice vs. The Bank of England, Co. Temp. Tal. 217. Same case, 2 Bro. Par. Ca. 2d Ed. 465, as commented on in Perry vs. Philips.

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those enjoined, including their commissions, and necessary expenses, there would be nothing left, even to pay Goode's debt. I have not, however, for the reasons hereafter stated, thought it necessary to enquire into that as that debt has been paid by them, out of their own estates. Suffice it to say, that it has probably priority to the other debts enjoined; and that they have a right to retain it, so that if the slaves have been lost to the estate, it does not appear that there are any assets to pay those debts: The decree, therefore, dissolving the injunctions and dismissing the bill as to them until the contrary appeared, was erroneous.

As to Goode, the decree dissolving the injunction as to him, was probably also erroneous, for the reasons above stated; and for this further reason; if the whole of the debts paid had not a legal priority over his, I am not prepared to say, that if administrators are promptly and *bona fide* paying off debts, believing they have assets sufficient to discharge all, and a large portion of those assets, are taken from them by a title paramount to that of their intestate; of which claim, they had no knowledge or suspicion, so as to guard themselves against such unforeseen events; that such payments ought to be considered a *devastavit*, against which a court of equity could not relieve. As to this, however, I am not to be considered as giving any positive opinion.

Be this as it may, the injunction as to Goode, was dissolved on the 20th of September, 1808: but in as much as there were private accounts between these parties, in June, 1809, for reasons appearing to the court, doubtless the consent of the parties, without which I presume no such reference would have been made, *these accounts*, not the accounts between the intestate and him, are referred. This was probably done by consent, without amending the bill, in order to put a final end to all matters between them. The account was taken, and after giving Goode credit for his judgment at law, a considerable balance

was found due from him, to the appellants. No objection is made to the taking of this account, nor was there any exception thereto.

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On this, the chancellor perpetuated the injunction ; no execution having been taken out in consequence of its dissolution, and probably because of these proceedings, and decreed Goode to pay to the appellants, the balance found due in that account, and decreed him his costs.

There was no appeal from this decree by either party ; but Goode having died before its execution, a *scire facias* was awarded at rules, it does not appear on whose application, to revive against his executors : It was accordingly revived, also at the rules ; and the executors filed exceptions to the report of the private accounts above stated.

After this, the court setting aside all previous orders, inconsistent with the final decree, dismissed the appellants' bill as to all the defendants, whether before the court or not.

This, as above stated, I think was erroneous, as it regarded the relief, sought against all, except the executors of Goode, and that, on the contrary, the injunction against Moore ought to have been re-instated.

As to the executors of Goode, if the decree against him above mentioned, had not been final, and if I could consider that decree as now before me, I might possibly reverse it, at the instance of the appellants, in order to let them in to shew that he was not entitled to a credit for his judgment, against their private account. I should not, as at present advised, be willing to reverse it for the alleged error in taking the account of those private transactions : But whether it ought to be reversed for either of those reasons, is not important to enquire, in as much as I consider that was a final decree, never appealed from by either party. That the *scire facias* was improvidently awarded, on the supposition that it was interlocutory, and that the decree finally dismissing the bill as to Goode's

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representatives, and which is the decree appealed from, was consequently erroneous, the decree against Goode, not being within the power of the court of chancery, except in a bill of review.

Every argument which influenced my opinion in favor of the finality of the decree, in the case of *Alexander vs. Coleman*, applies to this case; and indeed more strongly. Here there was no joint interest between the defendants: Facts which would justify a dissolution as to some of the parties in such a case as this, might not necessarily justify it as to others. If the assets were exonerated from Goode's judgment, in consequence of its being paid off by the private transactions, and if that would leave a greater fund applicable to the other judgments, and he wished to controvert those charges, and to shew that there was a debt still due to him from the estate, he ought to have appealed, in order that the chancellor might know what final decree to make as to the other parties.

On a motion for a dissolution afterwards as to others, would it have been competent for the appellants to oppose that motion, simply by alleging, that though it may be right, if the decree as to Goode is never reversed, that yet that decree is not final, and may be reversed, and if it is, there will be nothing to pay these creditors? This argument, if good, would not only prevent any dissolution as to others, but even suspend any final decree as to all, until Goode's decree shall, in some way or other, be made irreversible. On the contrary, if Goode had appealed, and the event of that appeal might have varied the claims of the other defendants, the appellants could well allege this as a reason for suspending the decision as to them, until that event was known. This would prevent much delay as well as injustice: pending this appeal, the case could be prepared as to the other parties, and a correct final decree pronounced from which no appeal would be necessary. It is highly expedient, therefore, that such a decree as this, should be considered final, from which either party may appeal.

I therefore concur in the decree prepared to be entered in this case.

The following was inserted as the decree of the court :

The court is of opinion, that this case was proper for the jurisdiction of a court of equity ; and that the decree of the 21st of February, 1810, was final, as to Goode, and after the term at which it was pronounced, no longer in the power of the court of chancery, but by a bill of review ; and that, therefore, the *scire facias* awarded at rules to revive the suit against Goode's executors, was improvidently awarded, and ought to have been quashed at the costs of the plaintiffs. The court is further of opinion, that it does not appear from the accounts taken in this cause, whether assets enough of their intestate came to the hands of the appellants, to pay to the defendants, Gregory Johnson, Edwards and Enoch Moore, the amount of their several claims in a due course of administration, after deducting the just commissions of the administrators and the expenses of the administration, and satisfying debts of superior dignity ; and that further enquiries should have been made as to that point, by a commissioner, and in the mean time, the injunctions, as to these defendants, should have been continued ; and that the said decree is erroneous : Wherefore it is decreed and ordered, that the same be reversed and annulled, and that the appellees, Enoch Moore, out of his own estate, and John Goode and John Tucker, executors of Thomas Goode, deceased, out of the assets of their testator in their hands to be administered, do pay to the appellants their costs, by them in this court expended, and that the cause be remanded to the said superior court of chancery ; that the injunctions awarded therein against the defendants, Johnson, Moore and Edwards, be re-instated, and the cause otherwise further proceeded in, according to the principles of this decree.

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**Peyton's administrator against Carr's  
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A judgment obtained against a testator in his life-time, and not revived against his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations.

The operation of the statute will not be prevented by a *scire facias* sued out within the five years, on which the plaintiff suffered a non-suit.

This was an appeal from the Fredericksburg chancery court.

*William Carr*, in his life-time, obtained a judgment against *Yelverton Peyton*, in August, 1794. Both parties having died, the executor of the plaintiff sued out a *scire facias* against the administrator of the defendant, to revive the said judgment. At the trial of the *scire facias*, the plaintiff suffered a non-suit. Some years afterwards, Carr's executor filed a bill in chancery against Peyton's administrator, alleging, that he had been compelled to suffer a non-suit, because the defendant having pleaded "fully administered," the plaintiff was unable to prove assets. He alleges, that the defendant has abundant assets; which, however, he is unable to prove by evidence, and therefore calls upon the defendant for a discovery.

To this bill the administrator of Peyton pleaded, that the original *subpoena* in this cause was not sued out within five years after the administration with the will annexed of the estate of the said *Yelverton Peyton* had been committed to the defendant. This plea was overruled by the chancellor, and the defendant ordered to answer.

The defendant accordingly answered, alleging various matters of defence, which it is not material to notice.

It appeared, by the records of Fauquier county court, that the original judgment was obtained in August, 1794, on which an execution issued in the same month, but was

never returned. The administrator of Peyton qualified on the 28th day of February, 1803, and the *subpoena* in the chancery suit was sued out in 1809. The *scire facias* was issued and served in 1804.

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ex'r.

The chancellor ordered an account of the administration of Peyton's estate to be made up, and finally rendered a decree in favor of the plaintiff. From this decision, the defendant appealed.

*Stanard*, for the appellant.

*Harrison*, for the appellee.

May 7.—Judge BROOKE, delivered the opinion of the court.\*

The court is of opinion, that the proceedings on the *scire facias*, sued out by the appellee against the appellant, were insufficient to take the case out of the act of limitations. The non-suit submitted to by the appellant, restored the claim to the situation in which it stood before the *scire facias* issued; and more than five years having elapsed, before the *subpoena* issued in this case, the plea of the act aforesaid, relied upon also in the answer, ought to have been sustained by the chancellor. The decree is, therefore, reversed, and the bill dismissed.

\* Judge Green did not sit in this case.



1893.  
May.

**Miller's executors against Rice and others.**

Where an executor confesses judgments, and gives forthcoming bonds, for debts due by his testator, under the belief that the assets of the estate are amply sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor shall be relieved in equity.

This was an appeal from the Richmond chancery court. William Miller and James B. Ferguson, executors of Thomas Miller deceased, filed a bill against Rice and Seabrook, Galt and Johnson, John Forbes, and Isaac Curd and others, setting forth the following case :

The testator died in 1819, leaving a will, by which he directed that his executors should have full power to sell all his real and personal estate for the payment of his just debts, except his plantations called *Woodville* and *La Vallee*, which, he directed, should not be sold, if his other estate should be sufficient for the payment of his debts. The testator left a very large personal estate, appraised to \$ 61,512 95 cents, and a still larger real estate, consisting of various tracts of land in different counties. The executors did not doubt, that this large estate would be more than adequate to the payment of all the testator's debts ; and still less, that they would find any difficulty in selling the real estate, in order to raise the necessary funds. Under this belief, they did not resist the claims of any creditors of the estate, because there were debts of superior dignity ; and therefore they paid off many simple contract creditors ; and others obtained judgments *de bonis testatoris*. Among these, are the defendants *Rice* and *Seabrook*, who obtained a judgment for \$ 586 95 principal, who sued out a writ of *fiери facias*, which was still in the sheriff's hands at the time of filing the bill ; *Galt* and *Johnson*, who obtained a judgment for \$ 1,617 79,

and sued out a *fieri facias*, which was levied, and a forthcoming bond given by the complainants; *John Forbes*, who obtained a judgment for \$55, on which no execution had been sued out at the time of filing the bill; *Isaac Card*, who obtained judgment for \$40, issued execution, and the complainant *Ferguson* gave a forthcoming bond; *Archibald Bryce*, assignee of Ware, who was assignee of May, obtained a judgment for \$100, on which an execution issued, and was returned unexecuted. Another judgment was obtained by *John Martin*, for \$200, on which an execution issued, and the complainant, *Ferguson*, gave a forthcoming bond. A judgment was also obtained by one *Wigglesworth*, on an assigned paper, purporting to be a bond, but which, the complainants contended, was only a simple contract debt, in consequence of an irregularity in its execution. The complainants allege, that all the foregoing judgments were founded on simple contracts; and, believing that the assets were fully sufficient to pay all the debts, they did not think that their duty required them to embarrass simple contract creditors with pleas of debts of superior dignity, which would exhaust the legal personal assets. But, they now find, that in consequence of the great depreciation of real property, the whole of the real estate, if brought into market, would barely be equal to the payment of the debts. They allege moreover, that the real estate is so incumbered, that they cannot sell it without the assent of the creditors, who have liens upon it; or, if they should offer it for sale, subject to the liens, no prudent man would bid for it. They aver, that the personal assets are not by any means equal to the specialty debts. If, therefore, they should now be compelled to pay simple contract debts, they will, in all probability, be ultimately liable to make good the amount so applied, to the specialty creditors, out of their own estates. For these reasons, they pray that the several persons above-mentioned, may be made defendants: that they may be enjoined from further proceedings at law

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on their respective judgments, until a general adjustment can be made of the affairs of the estate, and compelled to wait for satisfaction of the said judgments, out of the real or equitable assets of the estate.

The chancellor granted the injunction as to *John Martin*, and denied it as to all other matters; but the injunction was afterwards granted according to the prayer of the bill, by the judges of the court of appeals.

Rice and Seabrook, Galt and Johnson, and John Martin, filed their answers. Galt and Johnson aver, that their judgment was obtained *by confession*; that the complainants had a full opportunity to defend themselves at law; that they are informed that a considerable part of the assets, has been applied to the payment of simple contract debts, after the respondents had gained a priority by bringing suit: that even as to the specialty debts which remain unpaid, if they should exceed the amount of *personal* assets, it is not even alleged by the complainants, that they exceed the real estate in their hands, properly applicable to the payment of those debts. The answers of the other defendants, are nearly to the same effect, except in some respects peculiar to their own cases, which it is not material to mention.

The chancellor dissolved the injunction, upon the motion of the defendants; and an appeal was allowed from the order of dissolution, by one of the judges of the court of appeals.

*Leigh*, for the appellants.

*Wickham*, for the appellees.

*May 14.*—Judge GREEN.

The appellants are executors of Thomas Miller, who, by his will, subjected his whole estate, real and personal, to be sold by his executors, for the payment of his debts.

He died seised of four tracts of land of great value ; the two most valuable of which, were subject to incumbrances for the payment of large debts, not due at the time of his death. His personal assets were appraised to upwards of £ 61,000 ; but the debts secured by the deeds of trust upon the said tracts of land, exceeded the whole amount of the personal assets. The appellees, who were creditors of Thomas Miller, severally instituted their suits against the executors for the recovery of their debts, all of which were due by simple contract, except one, which purported to be due upon a bond of the testator, signed by another for him. In the suit brought upon this paper, as the bond of the testator, the executors confessed a judgment for the "penalty of the bond," to be discharged by the sum due. This judgment was confessed to Wigglesworth, the assignee of the bond. In the other cases, judgments were rendered as follows : In that of Rice and Seabrook, upon a verdict, (what the plea was, does not appear.) The plaintiffs agreed to stay execution until the 1st of January succeeding, and that the judgment should not be considered as an admission or proof of assets : In that of Galt and Johnson, by the unconditional confession of the defendants ; and upon this judgment, the defendants gave a forthcoming bond, which was forfeited : In that of Forbes, by the unconditional confession of the defendants. That of Isaac Curd was rendered upon the verdict of a jury ; rendered upon issues made up upon the pleas of *non assumpsit*, fully administered, and debts of superior dignity ; and in this case, one of the defendants gave and forfeited a forthcoming bond. In that of Day, upon the admission of the defendants, that they could not gainsay the plaintiff's action, and in this case a forthcoming bond was given by one of the defendants, and forfeited. In that of Brice, in like manner. In that of Martin, upon the finding of the jury upon the plea of *non assumpsit* ; and a forthcoming bond has, in this case, been given and forfeited. All these judgments were *de bonis testatoris*.

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Rice and  
others.

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ex'rs.  
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others.

The appellants exhibited their bill against these creditors, praying an injunction to stay further proceedings on those judgments, upon the allegation, that the specialty debts secured by the deeds of trust aforesaid, exceeded in amount the personal assets, and had a priority to the simple contract debts, in a due course of administration: that the executors had not opposed the judgments obtained upon the simple contract debts, because they were confident that the sales of the real estate, in aid of the personal, would be greatly more than sufficient to pay all the debts of their testator, and that they had a power to dispose of the real estate for that purpose immediately; but, that they now find, that they cannot dispose of the incumbered lands, without the consent of the creditors, who have liens upon those lands; and that owing to the great and unexpected depreciation in the value of real property, it is doubtful whether the whole estate, real and personal, will be sufficient for the payment of their testator's debts; and thus, if they are compelled to pay the simple contract debts out of the assets, they may be bound to pay the specialty debts in part, out of their own estates. The injunction was refused, (except as to one defendant, whose answer negatives the peculiar grounds of the injunction as to him,) by the chancellor, awarded by the judges of the court of appeals, and dissolved by the court of chancery, upon the motion of some of the defendants, who had answered; and from this order of dissolution, the plaintiffs appealed.

Independent of the act of January, 1807, which provides, "that no executor or administrator shall be liable to answer any debt or damages out of his own estate, beyond the assets which may have come to his hands, in consequence of any false-pleading, mis-pleading, or non-pleading, in any action now depending, or which may hereafter be brought," &c.; and, upon the ordinary principles of a court of equity, an executor might have relief in equity, whensoever from any cause beyond his

controul, he could not make his defence at law, so as to ensure justice to himself, or to the estate of his testator; as, if a portion of the assets of the estate in the hands of the executor, (without which the assets would not be sufficient for the payment of debts,) were in litigation; so that the executor could not safely confess or deny the amount of assets in pleading at law, until the testator's title was ascertained; as, in the case of *Royal vs. Johnson*, (a) in this court; or, where the testator had been executor, administrator or guardian, and had not settled his accounts of administration or guardianship, and is indebted thereon, and his executor has not the means of ascertaining the amount which his testator may owe on such accounts. By statute, such debts have priority to all other debts, and the executor is bound to retain assets for their satisfaction. Yet, until the amount due from the testator could be ascertained, it would be impossible for the executor to protect himself by pleading at law. In such cases, and in cases of fraud, accident or mistake, a court of equity should relieve upon its ordinary principle, that where a party has a right, and no adequate remedy at law, he is entitled to the assistance of that court. But, where a party has a complete defence at law, and does not lose the benefit of it by fraud, accident or mistake, a court of equity cannot assist him; for otherwise, every cause would be tried twice, once at law and once in equity. The act of assembly before referred to, did not enlarge the jurisdiction of a court of equity, but gave to the executor a strictly legal defence, which, before that act, he had not. Thus, a judgment before that act, in the original action against an executor, was conclusive evidence of assets in the hands of the executor, for the payment of the judgment; whether he omitted to plead altogether, or omitted to plead "fully administered," or debts of superior dignity, or pleaded falsely, or committed some mistake in

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Rice and  
others.

(a) Ante, p. 421.

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Blee and  
others.

pleading ; and the executor, although he might, after such a judgment, plead fully administered, or no assets, or no waste to an action on such a judgment for a *devastavit*, such a plea would not avail him.

For, the judgment would disprove his plea conclusively, and a court of equity could only interfere on the ground of fraud, accident or mistake. But, the statute abrogated this rule of the common law, and permitted the executor, after a judgment, to plead and give full proof of the state of the assets, in a suit for a *devastavit*, notwithstanding his false-pleading, mis-pleading, or non-pleading, in the original action ; except perhaps, where the question as to the state of the assets, had been fully tried and decided in the former action. In all cases not coming within this statute, where the executor would have been so concluded by the former judgment at the common law, he is still concluded ; and a court of equity, cannot enlarge the operation of the statute, either by interfering to prevent a personal judgment against the executor, where he is so bound, or where there is no impediment to his defence at law ; or after a personal judgment against him, by relieving him, when there was no impediment to his defence at law and there be no fraud, accident or mistake, such as justifies the interference of a court of equity, in all other cases.

Let us test the case at bar by these principles. It was well observed at the bar by the appellants' counsel, that the will of Miller did not convert his real estate into personal assets : it only creates a charge upon it for the payment of debts, in aid of the personal fund. It does not devise the lands to the executors, but only gives a power to sell for the payment of debts ; so that the lands were equitable assets at most, and not liable to the payment of debts in a course of administration, but only ratably, without regard to the dignity of the debts. It appears from the appellants' own exhibits, that before any of the judgments in question were rendered against them, they

had the advice of three able attorneys, that they had no authority to sell any of the lands until the personal estate was exhausted in the payment of debts. They should have applied the personal assets to the payment of debts, according to their dignity and legal priorities; and left the simple contract debts, if that became necessary, to be satisfied *pari passu*, out of the equitable assets. If they had plowed the outstanding debts of superior dignity, to the actions upon simple contracts, this would have been the effect, and there was not the slightest impediment to, or embarrassment in, doing so. These debts were two only, completely ascertained by recorded deeds, of which they must be supposed to have had notice. It was their duty to themselves, the creditors, and the estate, to pursue this course; and if they had, neither they nor any other party interested, could possibly have been injured. They may yet, under the act of assembly, plead these specialty debts at law, against all the judgments rendered against them adversely, and upon which they have not given and forfeited forthcoming bonds; and there is no necessity, in relation to them, for the interposition of a court of equity. As these judgments confessed by the executors, or upon which they have given and forfeited forthcoming bonds, they do not come within the act of assembly; and for the same reason that they are bound at law, they are bound in a court of equity, unless they became so bound, by reason of such a fraud, accident or mistake, or in consequence of such a state of things as would justify the interposition of a court of equity upon its general principles. No fraud or mistake is pretended. The executors knew of the existence of the debts of superior dignity, and the quantity and value of the property of their testator, real and personal, at the time they confessed those judgments and gave those forthcoming bonds; and they deliberately intended to confess the judgments and to give the bonds. They can, therefore, only claim relief upon the ground, that the depreciation in the value of the real property was

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such an accident as a court of equity should relieve against. This has been likened at the bar, to a case in which the negroes of the estate had perished by pestilence, and the other property been destroyed by accidental fire. I will not say, that in case of such accidents as these, a court of equity ought not to afford relief. But, I am inclined to think, that it ought not; for, as to the property under the absolute controul of the executor, it should be converted into money, at least as early as the creditors could get judgments in a due course of law, and the money applied to the payment of the debts, and he ought not to hold it up at the risque of the creditors, of whose claims he has notice; and if not under the absolute controul of the executor, the property is not assets in his hands to be administered, and he is not bound, and ought not to treat it as assets, for which he is already responsible. In this case, the alleged depreciation of the real property, (the precise situation of which, as to their powers over it, in point of fact, was well known to the executors, and they cannot allege a mistake in point of law,) was not owing to any natural accident or great national convulsion. There is no proof in the record, of such depreciation, and the court can only proceed upon the general notoriety of the fact; and we know, that long before these judgments were rendered, property had gradually and greatly depreciated, and was still in a course of depreciation; and a further depreciation might justly have been anticipated. This depreciation was so gradual, that it can hardly be supposed, that it was very striking and alarming between the rendition of the judgment in question, and the application for the injunction in this case; the judgments being in March, April and August, 1820, and the application for the injunction in December, 1820. It seems to me, that the appellants, not deceived by any one, and with full notice of all the facts which ought to have influenced them, in the course of their administration, have acted improvidently, and now seek to

be relieved against the effect of their deliberate acts, done upon full information of all the facts which ought to have influenced their conduct, and which acts bind them at law. I know of no principle of a court of equity, which can justify such relief. A contrary decision can only be made upon principles which will lead to the consequence, that in all cases in which an executor can shew in a court of equity, that he has not assets to pay the debt recovered at law, in a due course of administration, he is entitled to relief, notwithstanding his acquiescence without defence, in the original judgment at law, and in a judgment establishing a *devastavit*, and a judgment upon the official bond of the executor; and thus frustrate the policy of the act, which authorises a suit upon the executor's official bond, next after obtaining the original judgment against the estate, without resorting, as was before necessary, to an action, to establish a *devastavit*, which was obviously intended to expedite the remedies of the creditors.

I think the order dissolving the injunction is right, and ought to be affirmed.

Judge COALTER, delivered the following opinion, in which judge BROOKE concurred :\*

I am of opinion, that under the circumstances of this case, as set forth in the bill, (and in which I think I am supported by the case of *Pickett vs. Stuart*,<sup>(b)</sup> and other cases in this court,) the appellants ought not to be made answerable out of their own estates, in default of assets of their testator, for the debts sought to be enjoined, by reason of the proceedings at law. The confession of judgment, under the circumstances, ought not, I think, under the equity of the statute, to place the party in a worse situation than a false plea. The giving delivery bonds, was necessary to prevent the assets from being taken to

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\* Judge Cabell did not sit in this cause.

(b) See Appendix, No. 2.

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others.

pay those debts ; and, therefore, they had no opportunity to make a defence at law, except in the first suit, and consequently, had no remedy but in equity. I, therefore, think, that the injunction ought not to have been dissolved, until an account had been taken of the legal assets of their testator, which came to their hands, and of the debts of superior dignity to those sought to be enjoined, and of which the appellants had such notice as would have given them priority to the judgments in the bill mentioned ; and also, an account of such debts of equal dignity, which the appellants, in a due and legal course of administration, had a right to pay off and discharge, and over which the appellees had obtained no legal priority, at the time of such payment.

The decree must, therefore, be reversed, with costs, the injunction re-instated, and the cause remanded to have an account taken, according to the above principles, and proceeded in to a final decree.

The following was entered as the decree of the court :

The court is of opinion, that the injunction in this case ought not to have been dissolved, until an account had been taken of the legal assets of the testator which came to the hands of the appellants, and of the debts of superior dignity to those sought to be enjoined, and of which they had such notice as would have given those debts priority to the judgments in the bill mentioned ; and also, an account of such debts of equal dignity, which the appellants, in a due and legal course of administration, had a right to pay off and discharge, and over which the appellees had obtained no legal priority, at the time of such payment.

The decree is, therefore, reversed, with costs, the injunction re-instated, and the cause remanded to have an account taken according to the above principles, and to be proceeded in to a final decree.

**Richards against Brockenbrough's administrator.**

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Where parties enter into an arbitration bond, referring a certain matter in dispute to arbitrators, who are to make their award by a certain day, and if they should not agree, to an umpire chosen by them; upon which the arbitrators, finding that they cannot agree, choose an umpire, who makes his umpirage *before the day appointed for the arbitrators to make their award*; such umpirage will be good.

An award which inaccurately requires the surety in the arbitration bond, to pay money as well as the principal, will nevertheless be sustained. Such a clause will only be regarded as surplusage.

Every thing is to be presumed in favor of an award.

This was an appeal from the superior court of King William county, where John Richards brought a suit against Newman Brockenbrough, as surviving obligor of Beale and Brockenbrough. The action was brought on an arbitration bond, executed by the said Beale and Brockenbrough to the said Richards. The condition of this bond recites, that a certain difference having taken place between *Beale* and *Richards*, the parties agree to abide by the determination and award of George Phill Young, and John Gresham, so that it be made under their hand *by the first day of January, 1810*; but if the said arbitrators do not agree, then they shall choose a third person, whose decision shall be binding on the parties. The condition concludes; "now if the above bound John H. Beale and Newman Brockenbrough, do and shall well and truly stand to the award, final end and determination, of George Phill Young and John Gresham, or, if they do not agree in opinion, then, in that case, the decision of the person that they may name or elect, then the above obligation to be void, or else to remain in full force and virtue."

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brough's  
adm'r.

The arbitrators not agreeing in opinion, made choice of Thomas Evans as umpire; who, *on the 30th day of December*, 1809, made and published his umpirage. This decision requires John H. Beale and *Newman Brockenbrough*, to pay to John Richards 146*l.* 8*s.* 2*d.* with interest from the 13th day of November, 1807, till paid; and further awards, that the said Richards is entitled to one-half of the crop of corn, and one-half of the shucks made on the said Beale's land, which was cultivated by them; and that the *plaintiff should retain to himself*, out of the said Beale's half of the crop of corn, 55 barrels, one bushel and one peck, on account of corn sold and made use of by the said Beale, &c.

Newman Brockenbrough having died, the suit was revived in the name of Austin Brockenbrough his administrator.

Issue was joined on the plea of *nil debet*; and the jury found a special verdict, subject to the opinion of the court, whether the award above-mentioned, be good in law or not.

The court was of opinion, that the law was for the defendant, and gave judgment accordingly.

Richards appealed.

*Wickham*, for the appellant.

*Stanard*, for the appellee.

For the appellant, it was contended that the award was good. The case of *Taylor vs. Nicolson*,<sup>(a)</sup> proves, that the critical nicety of the old books, does not prevail in modern times. An umpire may make his umpirage within the time limited for making the award.<sup>(b)</sup> It may be said, that the award was against *Brockenbrough*, as well as

(a) 1 H. & M. 87.

(b) Kyd on Awards, 56. Ib. 55. Williams's Saunders, vol. 2, p. 133, *Coppin vs. Hurnard*.

Beale, and that Brockenbrough was not a party to the award. The answer to this is, that the condition of the bond requires Brockenbrough and Beale to perform the award, and therefore, the award is in strict conformity to the submission. - But, even if this part of the award is erroneous, it must be considered as mere surplusage, and may be rejected without affecting the rest of the award.

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On the other side it was said, that the authorities were contradictory on this subject. Bacon's Abridgment, (c) which contains the original authority from which the doctrines of the other books are drawn, affirms the principle, that the arbitrators cannot even *choose an umpire* within the time limited for rendering the award; while in 2nd Term Reports, (d) it is said, that the umpire may be chosen before entering into an examination of the matters referred to them. Thus the arbitrators may choose the umpire *before* they make the award, and yet their power ceases from the time of choosing the umpire. The true principle is, that the umpire has no power to act until *after* the time limited for making the award. This doctrine is confirmed by the case of *Beck vs. Serjeant.* (e)

The award is also erroneous in making Brockenbrough jointly liable to pay *Beale's* debt. It is no sufficient answer to say, that this is mere surplusage; because an action will lie as well on the *award* as on the bond, (f) and in that case, would make Brockenbrough *primarily* responsible for a debt, for which he was only a *surety*.

The award is unjust and absurd as to the crop. By the award, Richards gets more than his moiety, and may even get the whole, if Beale's moiety should not amount to more than the quantity which Richards is directed to retain.

*May 17.*—Judge CABELL, delivered the opinion of the court.

(c) 1 Bac. Abr. 210, letter D.  
(d) Vol. 2, p. 644. *Roe vs. Doe*.

(e) 4 Taunt. Rep. 231.  
(f) Kyd on Awards, p. 193.

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This is an action of debt, brought by the appellant, John Richards, against Newman Brockenbrough, as surviving obligor, in a bond executed on the 21st December, 1809, to the said John Richards, by John H. Beale and the said Newman Brockenbrough, for the performance of an award or umpirage to be made of matters in difference between Beale and Richards.

The condition of the bond required the arbitrators to make their award by the 1st day of January, 1810 ; but, if they could not agree, they were then to choose a third person, whose decision was to be binding on the parties. No time is limited, within which the umpire was to make his umpirage. The condition of the bond concludes with declaring, that the bond is to be void, " if the above bound John H. Beale and Newman Brockenbrough " shall well and truly stand to the award of the arbitrators, or the umpirage of the umpire.

The arbitrators, not agreeing, chose, on the 29th December, 1809, Thomas Evans as umpire, who, on the 30th day of the same month, rendered an award under his hand and seal. The award, after reciting the arbitration bond, the disagreement of the arbitrators, and their appointment of the umpire, directs, that John H. Beale and Newman Brockenbrough shall pay to John Richards, 146*l.* 3*s.* 2*d.*, with interest thereon from the 13th day of Nov. 1807. It farther declares, that Richards is entitled to one half of the crop of corn and shucks made upon the said Beale's land, cultivated by them ; and that Beale is entitled to the other half of the crop of corn and shucks ; but, *that Richards shall retain to himself, out of the said Beale's half of the crop of corn, fifty barrels, one bushel and one peck, for and on account of corn sold and made use of by the said Beale, which was of the said crop, as well as for and on account of certain articles furnished the said Beale for the use of his family.* Newman Brockenbrough having died, the suit was revived against his administrator, Austin Brockenbrough, the appellee.

The declaration recites the condition of the arbitration bond ; states the disagreement of the arbitrators ; their failure to make any award before the first day of January, 1810 ; their appointment of the umpire, and the substance of the award as above set forth ; and then assigns as the breach of the condition of the bond, the non-payment of the above sum of 146*l.* 3*s.* 2*d.*, with interest as aforesaid. To this declaration the defendant pleaded "*nil debet*," with liberty to give in evidence any special matter, which, if pleaded specially, would bar the plaintiff's action.

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The jury, reciting the award *in hæc verba*, find for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of 146*l.* 3*s.* 2*d.*, with interest from 15th November, 1807, if, in the opinion of the court, the award be good in law ; otherwise, they find for the defendant. The court decided, that the law was for the defendant, and gave judgment accordingly ; from which judgment, an appeal was taken to this court.

The objection to this award, mainly relied on by the counsel for the appellee, is, that it was made by the umpire before the expiration of the time within which the arbitrators themselves might, according to the terms of the original submission, have made an award.

We find in the books a vast variety of questions, and much contrariety of opinion, concerning the appointment and duty of umpires. Distinctions are taken between those cases where the umpire is named by the parties, in the submission, and those cases where the appointment is referred to the discretion of the arbitrators ; and also, between those cases in which the umpire is directed to make his umpirage within the same period which is limited for the award of the arbitrators, and those in which a farther time is allowed to the umpire.

The case, now before us, arises on a submission, by which the appointment of the umpire was referred to the arbitrators, and by which the time limited for the umpirage of the umpire extends beyond that limited for the



1828.  
May.

Richards  
vs.  
Brooken-  
brough's  
adm'r.

award of the arbitrators ; and to prevent a confusion of ideas, it may be well to premise that the remarks we may hereafter make, although they may be applicable to other cases also, are to be considered as referring only to cases growing out of such a submission, unless it may be otherwise declared.

It was formerly held, that if arbitrators chose an umpire before the time allowed for their award was expired, such nomination was *ipso facto* void. So long as this opinion prevailed, it was impossible that any question could be made as to the power of the umpire ; for, there could be no umpirage without an umpire. The desire, however, to favour these domestic tribunals, at length induced the courts to support such a nomination, for the purpose of establishing an umpirage made *after* the time when the arbitrators were to have made their award. (g) This case has been followed by a great many others, confirming the awards of umpires who were *appointed* before, but did not *act* till *after* the time when the arbitrators might have made their award. And such has long been the settled law. In many of the cases alluded to, the judges *said*, that the umpire could not interfere *before* the time allowed the arbitrators had expired. (h) But, we have not seen any case, in which the point has been directly brought in issue before the English courts. In the absence of decided cases, we must be governed by principles. It becomes, therefore, important, to ascertain the grounds on which the courts have supported umpirages, made after the time allowed to the arbitrators ; and, if these grounds are applicable to umpirages made *before*, they also ought to be supported. These grounds have not always been the same. The ground assigned in *Watson vs. Clement*, Rol. p. 5, and in *Mitchel vs. Harris*, above referred to, and also, in the case of *Daws vs. Moncey*, 8

(g) *Watson vs. Clement*, Rol. p. 5. Kyd on Awards, 51.

(h) *Delaval vs. Maschall*, 1 Mo. 274. Sr. T. Raymond, 205. 1 Lev. 235, *Mitchel vs. Harris*. 1 L. Raymond, 671. 12 Mod. 512. 1 Salk. 71, 72.

Geo. II, (i) is, that by the nomination of an umpire, the authority of the arbitrators is at an end. And Sergeant Williams, the learned and accurate annotator of Saunders's Reports, is of the opinion, (j) that that is now the settled law. If this be the true ground of decision, there is certainly as much reason for supporting an umpirage made *before*, as for supporting one made *after* the time limited, by the submission, for the arbitrators to make their award. In both cases the power of the arbitrators is at an end. In the last case it expired by efflux of time; in the first, by the act of the arbitrators themselves. But, in some of the cases, the reason assigned for supporting such an umpirage is, that although the arbitrators might, notwithstanding their nomination of the umpire, have proceeded themselves to make an award; yet, as in fact they made no award within the time, the umpirage shall be good. (k) This reason, also, applies with equal force to umpirages before and after the time allowed to the arbitrators.

1823.  
May.  
Richards  
vs.  
Brocken-  
brough's  
adm'r.

We find, also, that where the time within which the umpirage is to be made, is the same with that limited to the arbitrators, if the umpire is appointed by the arbitrators, and makes his umpirage before the expiration of the time, such an umpirage will be supported. (l) We see no reason for supporting an umpirage in such a case that does not apply to that now before the court.

Where there is the same reason, there is the same law. We are, therefore, of opinion, that the first objection made to the award, is not entitled to any weight.

Nor are we inclined to allow any force to the objection, that *Brockenbrough* was directed to pay the money awarded, jointly with *Beale*. The award itself shews, that no

(i) Rep. Prae. C. B. 116.

(j) 2 vol. 133-6.

(k) *Elliot vs. Cheval*, Lutw. 541. See also, *Jennings vs. Vandeput*, Cro. Ch. 963, and *Deval vs. Maschall*, above cited. Kyd on Awards, 51-2-3.

(l) *Fyall vs. Varier*, 1 Roll. 961, pl. 3. *Godbolt*, 241. *Twisleton vs. Travers*, 1 Lev. 174. 2 Keb. 15. See also, note 7, 2 Saunders, 133. Kyd on Awards, 50.

1823.  
May.

Richards  
vs.  
Brocken-  
brough's  
adm'r.

other matters were considered, but those between Richards and Beale. That direction was evidently, therefore, made in adherence to the informality of expression in the condition of the bond, which requires "the said John H. Beale and the said Newman Brockenbrough" to stand to the award. It can only be regarded as surplusage.

Nor is there any thing in the objection to that part of the award which states, that Richards shall retain to himself a portion of Beale's share of the corn. Every thing is to be presumed in favour of an award. We are not told how much of the corn had been used by Beale, nor how many articles had been furnished for the use of his family, by Richards: There is nothing to shew, that Richards was directed to retain more of Beale's share of the corn than he ought to have retained.

Perceiving no ground to impeach this award, we are of opinion, that the judgment is erroneous. It must, therefore, be reversed, and judgment entered for the appellant, pursuant to the verdict.

1823.  
May.

### Kidd's administrator against Alexander's administrator.

The certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence; but the *deposition* of the notary public, or some equivalent testimony, ought to be produced to the court.

This suit was originally brought in the county court of Caroline, and afterwards removed, by *certiorari*, to the Fredericksburg chancery court.

The administrators of *Isaac Kidd*, filed their bill to in-join a judgment obtained against them by Benjamin Alexander, on a bond executed by their intestate, as security to one John Segar. They allege that considerable payments had been made towards the discharge of the said bond; one in particular, in William Hill's bond for 106*l*. paid to *John Scott*, to whom at that time the bond aforesaid of John Segar had been transferred, though not legally assigned: that having no wish to postpone the payment of any balance actually due, they agreed to waive the issue, and prove their discounts before John Pendleton: that in consequence of the non-attendance of a witness, at the time and place appointed, they have had no opportunity to establish their payments and set-offs, and the judgment has become final. They therefore pray an injunction, and other relief.

1823.  
May.  
Kidd's  
adm'r.  
vs.  
Alexander's  
adm'r.

The injunction was awarded.

Alexander having died, the suit was revived against his administrator, who answered that he has no personal knowledge of the transactions in question, but believes it to be true, that the said Alexander parted with the bond, without assigning it, and that he was not to make it good, nor was any recourse to be had against Alexander, in default of payment.

A motion to dissolve the injunction was denied.

*Israel* and *John P. Pleasants*, were admitted defendants, on their motion. They filed an answer stating; that *John Scott* (named in the bill) being indebted to the defendants, they received, by their agent, the said bond, with an assignment of a number of small bonds on other persons; although at the same time, they understood that the said Scott, held other bonds of the said Segar's, to which there was no security, and against which, they were induced to believe there were some set-offs on account of payments to the said Scott by the said Segar. They conceive, that if there had been no set-offs against these last-mentioned bonds, Scott would rather have assigned *these* for the

1823.  
May.

Kidd's  
adm'r.  
vs.

Alexander's  
adm'r.

payment of his debt, than to have assigned a parcel of small bonds, which he did. The defendants state, that they allowed to the said Scott, the full amount of *Segar's* and *Kidd's* bond, and have never received a cent on account of it: that they have heard and believe, that the set-offs ought to be applied to the other bonds of the said *Segar*, held by *Scott*, and not to that in which *Kidd* was the surety: that very soon after obtaining possession of the said bond, the defendants lost no time in reducing their claim to a judgment: that *Segar* never directed the application of his payments, to this particular bond in which *Kidd* was his surety; and it is not probable, that *Scott*, the creditor, would apply those payments to this bond, in preference to the bonds which he held without any additional security.

Several depositions were taken, all of which, go to establish the plaintiff's allegations, except that of *John Scott*, who is mentioned in the foregoing bill and answers, as having received the bond in question from *Alexander*, and transferred it to *Israel* and *John Pleasants*. Before his deposition was taken, *Israel* and *John Pleasants* executed a release to *Scott* under their seal, relinquishing all claim on the said *Scott*, on account of the transfer of the bond to them. The execution of this release, was certified by *John Gill*, notary public of the state of *Maryland*, in the form in which notarial acts are usually executed.

The chancellor referred the accounts between the parties to a commissioner, who reported a balance of \$399 48, to be due from *Segar* and *Kidd*, to *Israel* and *John P. Pleasants*. Exceptions were filed, and the chancellor decreed, that the injunction should be dissolved as to the sum of \$177 15 cents, with interest, &c. (that being the balance due, after applying to the plaintiff's credit, a due proportion of *Hill's* bond, in the proceedings mentioned,) and that the injunction be perpetuated as to the residue of the said judgment. From this decree, the plaintiffs appealed.

**May 14.**—Judge BROOKS, delivered the opinion of the court :

1823.  
May.

Hill's  
adm'r.  
vs.  
Alexander's  
adm'r.

The court not deciding whether, if proved, the release in the record would be effectual to bind the late house of Israel and John P. Pleasants, is of opinion, that the certificate of the notary public, John Gill, that John P. Pleasants, partner in the late house of Israel and John P. Pleasants, acknowledged it to be his act and deed, was inadmissible evidence to prove the execution of the said release. To effect that object, the deposition of the notary public, or some equivalent testimony, ought to be before the court. In the absence of such proof, the court is of opinion, that John Scott, the assignee of the bond in question, was an incompetent witness, and his deposition and affidavit, also inadmissible testimony.

The court is further of opinion, that admitting the release to have been well executed, and the competency of the witness, John Scott, his testimony would be entitled to but little weight; it appearing by his own shewing, that he assigned the said bond to Israel and John P. Pleasants, as then wholly due and unpaid, though by his receipt for Hill's bond, and the application of it according to the terms of the receipt, a large proportion of the bond in question, was discharged at the time of the said assignment, of which he was not ignorant when he gave his deposition and affidavit in the cause. The court, for the foregoing reasons, reverses the chancellor's decree; and it is decreed and ordered, that the injunction be perpetuated, except for the sum of \$20 96 cents, with interest, at the rate of five *per cent.*, from the 15th of October, 1802, until paid.

1823.  
May.  
**Green against Skipwith.**

It is error in a court of law to enter a judgment against a defendant, on the day after a conditional judgment has been confirmed at the rules. The defendant has until the next term after the conditional judgment is confirmed in the office, to set it aside, under the act of assembly.

This was an action of debt, brought by Skipwith against Green, in the superior court of Mecklenburg. A conditional judgment was entered against Green and his appearance bail, which was confirmed on the 7th April, at the rules. On the 8th day of April following, judgment was rendered by the court, the defendant "still failing to answer the plaintiff's action.

Green obtained a *supersedeas* from a judge of the court of appeals.

**May 19.**—Judge BROOKE, delivered the opinion of the court :

The court is of opinion, that it was error in the superior court to enter a judgment against the defendant, on the day after the conditional judgment had been confirmed at rules ; the defendant having until the next term after the conditional judgment is confirmed in the office, to set it aside, under the act of assembly.

The judgment is, therefore, reversed, and the cause remanded, with liberty to the appellant to plead and set the office judgment aside, on the usual terms, or to be final, in case of his failure to set it aside.

**Hairston against Cole.**

1823.  
May.



A bill of exceptions, stating that a manuscript, "purporting to be a copy of an act of the General Assembly, entitled an act, &c.," is too imperfect to enable the court to pronounce any opinion thereon, it not being stated that the said copy was authenticated, and how authenticated, and the manuscript not being set out in the bill of exceptions.

Where a bill of exceptions states a case imperfectly, the cause will be remanded for a new trial.

This was an ejectment brought in the superior court of Henry county, by *Cole* against *Hairston*. At the trial, the plaintiff offered in evidence, a manuscript, *purporting to be the copy of an act of the General Assembly of Virginia, the title whereof is in these words*, "an act to suspend in part, the operation of the act concerning escheats and forfeitures from British subjects, and for other purposes." The defendant objected to the introduction of this evidence; but, the court overruled his objection, and permitted this paper to go to the jury. The defendant excepted. The jury found a verdict for the plaintiff, and the court rendered judgment in his favor. From this judgment, the defendant appealed.

*Wickham*, for the appellant.\*

The *Attorney General*, for the appellee.

*May 20.*—Judge BROOKE, delivered the opinion of the court:

The statement in the bill of exceptions, that a manuscript *purporting to be a copy of an act of the General As-*

\* *Wickham* referred to the following cases to shew that the court will send a cause back, when a bill of exceptions states a case too imperfectly to render a judgment. 1 Call, 215, 223, *Barrett vs. Tazewell*. 2 Munf. 253, 256, *Beattie vs. Tabb's adm'r*.



1823.  
May.

Hairton  
vs.  
Cole.

sembly of Virginia, entitled an act, &c. is too imperfect to enable the court to pronounce any opinion thereon, it not being stated that the said copy was authenticated, and how authenticated, nor is the said manuscript set out in the bill of exceptions. The judgment is therefore reversed, and the cause remanded for a new trial.

1823.  
May.

### Brown against Matthews.

An appeal is taken from the county court sitting in chancery, and a bond is given, which is in fact a *certiorari*, and not an *appeal bond*. No objection is made to the regularity of the bond in the court of chancery. An appeal is taken to the Court of Appeals. In that court, an objection is made, for the first time, to the bond. The objection comes too late; but if it had been made in the court of chancery, that court could only have dismissed the appeal *nisi*, or have laid the party under a rule to give a proper bond, in a reasonable time.

This was an appeal from the chancery court of Greenbrier, which reversed a decree of the county court of Greenbrier sitting in chancery.

A suit was brought in the county court, by *Samuel Brown* against *John Matthews* and others, which was decided in favor of the said Brown. On petition to the chancellor, an appeal was allowed on the usual terms of giving bond, &c. A bond was accordingly given; but it was in fact a *certiorari* bond, instead of an *appeal bond*. In the court of chancery, no notice whatever was taken of this error; but the chancellor entertained the appeal, and finally reversed the decree.

An appeal was taken to this court by Brown.

*Wickham*, for the appellant, contended, that there was no appeal from the county court to the court of chancery, as no appeal bond had been given, or if it were given, the bond was not good, being only executed by a surety. He said, that the court of appeals would look into the regularity of the steps in taking an appeal ; and that this case was not like that of a court of original jurisdiction, where a party has a day given him to plead. He must take advantage of an error in this way, or in none.

1823.  
May.

*Brown*  
*vs.*  
*Matthews,*  
*&c.*

*May 22.*—Judge BROOKE, delivered the opinion of the court :

The court is of opinion, that if the bond was such a bond as seemed to be supposed by the bar, the objections taken to it, would not avail. But the bond in the record, is a *certiorari* bond, and not an *appeal* bond. If objected to in the court of chancery, that court would not have finally dismissed the appeal. The taking an improper bond, being the mistake of its clerk, the most it could do, would be to dismiss it *nisi*, or to lay the party under a rule to give a proper bond in a reasonable time. In this court, the objection comes too late. The appellant *Brown*, who was the appellee in the court of chancery, having not only omitted to make the objection there, but by putting in a plea, admitted that the appeal was regularly before that court. On the merits, the court is of opinion to affirm the decree.

1823.  
May.



## Howard against The Overseers of the Poor, &c.

On an appeal from an order of a county court, providing for the support of a bastard child, it is error for the appellate court to receive new evidence of the fact, which was not before the county court.

The right of appealing from *facts*, is confined to the cases of mills, roads, the probat of wills, and certificates for obtaining administration.

When a charge is made before a magistrate by the mother of a bastard child, the charge ought to be taken down in writing, under the act of assembly.

Sarah Pemberton made oath before a magistrate of Powhatan county, that Thomas Howard was the father of a bastard child, of which she had been delivered; and, upon the application of one of the overseers of the poor, who stated that the said child would become chargeable upon the county, the magistrate bound the said Howard in a recognizance to appear at the next county court of Powhatan, and abide by, and perform the orders of such court, as should be made in the premises. But, he did not take down the charge of Sarah Pemberton in writing.

The county court, upon hearing the complaint, ordered, that Thomas Howard should be charged with the annual payment of thirty dollars, for the maintenance of the said child, for the term of ten years, &c.

Howard appealed to the superior court of Powhatan.

On the trial of the appeal, sundry witnesses were heard, and the court affirmed the judgment of the county court; and, on the motion of Thomas Howard, it was ordered, that the said testimony should be spread upon the record.

Howard appealed to the court of appeals.

*Nicholas*, for the appellees.

No counsel for the appellant.

May 29.—Judge BROOKE, delivered the opinion of the court :

1893.  
May.

Howard  
vs.  
Overseers  
of poor, &c.

The court is of opinion, that the appeal from the county to the superior court, was not an appeal from the fact, but from the *law* only ; and that it was irregular in the superior court, to receive evidence, which was, or ought to have been heard by the county court ; the 18th section of the act to reduce into one the several acts concerning the court of appeals, and the special court of appeals, having virtually limited appeals from the *fact*, to the cases of *mills, roads, the probat of wills, and certificates for obtaining administration*. The court, however, would not reverse the judgment of the superior court, for this error. But, on the authority of the case of *Mann vs. The Commonwealth*, (a) and on further consideration of the 23d section of the act, providing for the poor, and declaring who shall be deemed vagrants, (b) it appearing by the proceedings in the county court, that the charge before the magistrate by the mother of the bastard child, was not taken down in writing, according to one of its provisions, the court is of opinion, to reverse both judgments, and to dismiss the complaint.

(a) 6 Munf. 452. (b) Old Rev. Code, 183.

1823.  
June.



### **Gwathmeys against Ragland.**

A debtor executes several notes to his creditor, and gives a deed of trust to secure their payment. The first note is duly paid. The creditor assigns the second note to a third person, without assigning the deed of trust. The third note is assigned to another person, together with the deed of trust. The assignee of the second note is entitled to the first satisfaction out of the trust fund.

A deed of trust was executed by William and Francis Sutton to trustees, to secure the payment of three notes to a certain Anderson Barrett. The first note was paid ; the second transferred by endorsement to Nathaniel Ragland, without any assignment to him, of the deed of trust ; the third note was endorsed to Robert and Temple Gwathmey, who took an assignment of the deed of trust, for their security.

The trustees having advertised the land for sale, to satisfy Ragland's claim, Robert and Temple Gwathmey filed a bill, in the superior court of chancery of Richmond, against Ragland and the trustees, to injoin them from selling the trust property, to satisfy Ragland's claim ; alleging, that as they had taken an assignment of the deed of trust, and Ragland had not, they were entitled to a preference over him, in satisfaction of their claim out of the trust property.

The injunction was granted.

Ragland answered, that he was induced to take an assignment of the note in question, by the equitable right which he acquired thereby, to the deed of trust ; without which he would not have taken the said note.

On motion of Ragland, the injunction was dissolved ; from which order the plaintiffs obtained an appeal, from a judge of the court of appeals.

*Wickham and Leigh*, for the appellants.

1823.  
June.

*W. Hay, junr.*, for the appellee.

Gwathmeys  
vs.  
Ragland.

**June 2.**—Judge BROOKE, delivered the opinion of the court :

The court is of opinion, that the deed of trust from the Suttons, being intended by the parties to it, as additional security for the payment of the note to Barrett or his assigns, in the order in which they fell due, it followed the notes into the hands of the several holders thereof; and that it was not competent to Barrett, by an assignment of the deed to the appellants, (without the assent of the appellee, to whom the second note had been assigned) to deprive him of his priority of right, to demand a sale of the trust property in the deed, if necessary to the payment of the note so assigned, in the order of payment expressly directed by the deed. No misrepresentation or fraud being imputed to the appellee by the bill, he stands on as equitable ground as the appellant; with this difference, that by the directions of the deed, as assignee of the second note, he has priority of right to be paid out of the trust fund. The deed being assigned to the appellants, gave them full notice of the order, in which the notes were to be paid to Barrett or his assigns, and at least put them on the enquiry, whether the first and second notes had been paid at the time they took the assignment of the third note, and of the deed of trust. By not making that enquiry, if they relied on the trust fund as security for the payment of the note assigned to them, they may have lost their money. However that may be, as against the appellee, to whom no negligence or fraud is imputable, the court is of opinion that he has no claim to be preferred. The decree is therefore affirmed.

# APPENDIX.

## No. 1.

---

1822.  
April.

Judge CABELL's opinion in the case of *Burwell and others* against *Corbin and others*, which was omitted in page 147.

Judge CABELL :

Two questions arise in this case :

1. As to the admissibility of the deposition of William Ball.

2. As to the due execution of the will.

1. The objection to Ball's testimony is, that he had an interest in the cause, at the time his deposition was taken, by his being then liable to the costs as the *next friend* of the infant plaintiffs.

If he really was thus liable to the costs, the objection would be insuperable, and his deposition inadmissible. I do not deem it important to decide, in this case, what acts of appointment, or of approbation or permission, on the part of the court, are necessary to constitute a *next friend* ; nor in what particular stage of the suit, such acts must be performed. But I hold it to be a principle of natural justice, not contravened by any law, that whatever the court may do, no man can be made a *next friend*, so as to subject him to costs, without his own consent. In the case now before us, such consent is not expressly proved ; nor is it to be implied from any testimony or

proceeding in the cause. It does not appear, that he had any agency in instituting or conducting the suit. There is not merely the total absence of testimony to prove consent, express or implied ; but there is as strong proof to shew that he did *not* consent, as could be expected to be adduced in support of a negative : for the attorney, who instituted the suit, expressly states, that he used the name of Ball as *next friend*, without consulting him, and without his authority ; and that so far as he knew or believed, Ball was not apprised, prior to, or even at the time of, giving his deposition, that his name had been so used : nor is such knowledge fixed upon him, by any other witness in the cause. He cannot, therefore, be liable to costs ; and, not being so liable, the idea of his being interested vanishes ; and, with it, the objection to his testimony.

1822.  
April.

Burwell  
and others  
vs.  
Corbin and  
others.


2. The other question relating to the execution of the will, is of great importance on account of the principles it involves.

The testamentary disposition of property is a legitimate and necessary subject of municipal regulation. Even if the right to make such disposition does not rest entirely on municipal laws, it certainly must depend on them for its effectual and beneficial exercise. They regulate the manner, and point out the solemnities which must attend it ; they prescribe the proof for establishing and perpetuating the disposition, and they enforce its execution.

After a will has been determined to have been duly executed, our laws pay great regard to the want of advice or of learning, in which it may have been written ; and, therefore, construe it benignly, with great favour and liberality, so as to effectuate the real intention of the testator, although he may not have used the words and phrases most proper for expressing that intention. But no such liberality is permitted in dispensing with any of the requisites of the statute, as to the execution and proof of



1832.  
April.

 Burwell  
and others  
vs.  
Corbin and  
others.

the will. The forms required for these purposes, are guards devised by the wisdom of the legislature, against the practice of imposition on testators *in extremis*, and the fabrication of false and spurious wills after their deaths. A strict adherence to these requisites may sometimes defeat the wishes of particular individuals. But it is better to permit a particular inconvenience, than a general mischief. And this maxim is, perhaps, more applicable to this subject, than to most others; for, if a man fails, by omitting the requisites of the statute, to make a will for himself, the law makes one for him; which, in most cases, is a good will, and, in many cases, the best will.

Our statute of wills requires, that a will shall be in writing; that it shall be signed by the testator, or by some other person in his presence, and by his direction; and moreover, if not wholly written by himself, that it shall be attested by two or more credible witnesses, subscribing their names in his presence. It is, in its essential parts, very nearly a transcript from the English statute of 29th Ch. 2, ch. 3, commonly called The Statute of Frauds and Perjuries. The principal difference is, that we do not in any case, require more than two witnesses, while they require three; and that we dispense entirely with the attestation of subscribing witnesses, where the will has not only been signed by the testator, but wholly written by himself. The English decisions on the subject of wills, will be therefore entitled to great respect.

As to what shall amount to proof, that a will was signed by the testator, a question arose in England shortly after their statute, which, although decided as early as the year 1682, (a) has been renewed from time to time, till the year 1813. (b) That question was, whether the witnesses should “see the testator sign,” or whether the testator’s acknowledgment of the signature, would be sufficient. It

(a) See 2 Ch. Ca. 109. (b) 1 Ves. and Beam. 362, Westbreach vs. Kennedy.

is true, the question did not always assume that precise form; for, it was often in the shape of an enquiry, whether the witnesses could *attest at different times*. But, although differing in form, the question was, in fact, the same; for, the will having been signed in the presence of one or more witnesses, those who were called in to attest it afterwards, could attest the acknowledgment only. There was, indeed, one case, *(c)* in which the testator, "with his pen, went over his name:" but no importance was attached by the court to that circumstance. The real question was, whether the *acknowledgment* by the testator, was sufficient. It is somewhat remarkable, that the bar should so often have made this question; for it was decided by the court, invariably, in favour of the sufficiency of the acknowledgment. *(d)* It is possible that the case of *Lea vs. Lib, Carthew* 35, may be considered as constituting an exception to this current of authorities. But, so far as relates to this point, the question did not arise in that case; for, the will was proved by one witness only, and the codicil by two. What fell from the judges in that case on this point, may be considered as an *obiter dictum*; and it was so regarded by Parker, chief baron, in *Ellis vs. Smith*. *(e)*

The counsel for the appellants, while they rightly contended that the signature to the will must be proved, and while they admitted that proof of the testator's *acknowledgment* of the signature, would be received as full proof of the signature itself, contended nevertheless, that proof of the testator's *acknowledgment*, that a writing purporting to be a will, and having the testator's name signed to it, is *his will*, would in no case be sufficient. I have exa-

*(c)* Jones vs. Lake, 2 Atkins, 176, and 2 Ves. 455, (in a note.)

*(d)* Anon. 2 Cha. Ca. 109. Cook vs. Parsons, Pres. Ch. 184. Lemayne vs. Stanley, 3 Lev. 1. Jones vs. Lake, 2 Atkins, 176, (in a note.) 2 Ves. 455, 8. G. Dormer vs. Tharland, 2 P. Wms. 509. Grayson vs. Atkinson, 2 Ves. 454. Stonehouse vs. Evelyn, 3 P. Wms. 252. Ellis vs. Smith, 1 Ves. jr. 11. Addy vs. Griz, 8 Ves. 504; and Westbreach vs. Kennedy, 1 Ves. and Beam. 364.

*(e)* 1 Ves. jr. p. 12.

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mined with minute attention, every case to which they referred, and many others in addition: but I have not observed a single decision, countenancing such a distinction. The only case that even looks that way, is the case of *Gryle vs. Gryle*, (f) in which, Lord Hardwicke declined giving any absolute opinion, but was inclined to think the will void, because, although it had been executed in the presence of two witnesses, the third witness only heard the testator "*acknowledge it to be his will.*" Even the leaning of such a mind as Hardwicke's is entitled to respect, if it continue to lean. But, it is manifest from what he himself said eleven years afterwards, in *Grayson vs. Atkinson*, (g) that his mind was confirmed in the opposite direction. In that case, the question was, whether the witnesses should prove the "*factum of signing,*" and of course all must have *seen* the signing,) or whether proof of the testator's *acknowledgment*, is not proof of the *signing*. Some of the witnesses, did not *see* the testator sign; and the case is not so stated, as to shew the precise terms of the *acknowledgment* made to the others. It is certain, however, that no distinction was made between a testator's acknowledging his *signature* to a will, and his acknowledging a will signed by him, to *be his will*; and I am of opinion, that the arguments of Lord Hardwicke, apply as strongly to the one, as to the other.

The case of *Ellis vs. Smith*, (h) came on in the year 1754, (two years after *Grayson* and *Adkinson*,) and Lord Hardwicke was assisted by Sir John Strange, master of the rolls, Willes, chief justice, and Parker, chief baron. In this case, as in the preceding, there is no statement of the circumstances. But, in this case also, the question was as to the sufficiency of proof of the testator's declaration or acknowledgment; and the sufficiency was sustained by the unanimous opinion of the court. Parker, chief baron, speaks of it as a "*declaration that it was his will.*" He refers,

(f) 2 Atkins, 176. (g) 2 Ves. 454. (h) 1 Ves. jr. p. 11.

also, in support of his opinion, to a case in *Skinner*,<sup>(i)</sup> where the acknowledgment was to the same effect. Sir John Strange speaks of the acknowledgment as being of the same kind. *Willes*, chief justice, speaks of the acknowledgment as being of the hand writing; and the Lord Chancellor speaks of it generally, without confining it to the will or signature. This indiscriminate use of the terms, "acknowledgment of the hand writing or signature," and "acknowledgment of the will," proves that the judges did not think there was any difference between them.

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But, it is useless to multiply cases on this point. I will mention only one more, *Westbreach vs. Kennedy*,<sup>(j)</sup> which seems to me directly in point; for, there the reporter gives the words of the third witness, who did not see the testator sign, but heard him acknowledge it to be "his will."

There is not, therefore, on authority, any such distinction as that contended for by the counsel for the appellants; nor can it be admitted on principle. The whole of the doctrine on this subject, is simply this: that, where the witnesses do not prove the *factum* of signing, by having actually seen the testator sign, they must prove that he *recognised* the signature. But, what shall amount to proof of such recognition, is to be determined by the general principles of evidence. Why is proof of the testator's express acknowledgment or declaration, that the signature is his, held to be sufficient? Because, such proof, by the subscribing witnesses, is, in the absence of other testimony, deemed and taken to be *evidence of the signing by the testator*, equivalent to proof by them that they saw him sign. And, when a man, holding in his hands, or pointing to, a paper writing lying before him, and having his name previously signed to it, says to the witnesses, "this is my will," such declaration refers not merely to the writing above the name, but to the name also; and,

(i) Pa. 227. (j) 1 Ves. and Beames, p. 364.

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therefore, is as much evidence of the signing by the testator, as if he had acknowledged the signature in terms. Indeed, if there be any difference, I think the difference is in favor of the acknowledgment that it is *his will*; for, that is not merely evidence of the signing, but is an effectual publication of it as his will.

But, although I cannot assent to the distinction contended for by the counsel for the appellants, I am yet of opinion, that this will has not been executed according to the statute.

The statute requires a will to be *signed*, which it permits to be done, either by the testator himself, or by some other person for him; but, if the signing be, not by the testator himself, but by some other person, it must be done in the presence of the testator, and by his direction; which facts must be proved by two witnesses, subscribing their names in his presence. No defect in their testimony can be supplied *aliunde*. They must prove every thing, or the will falls. Moreover, each witness is to prove all that is necessary to the execution of the will. No deficiency in the testimony of either subscribing witness, can be supplied by the full testimony of the other. Each must, therefore, prove the signing by the testator; or, if it shall appear, that the signing was not by him, but by some other person, each witness must prove it to have been done in the presence of the testator, and by his direction. In other words, each witness must prove every thing which it would be necessary for him to prove, if the law required one witness only.

Let us apply these principles to the testimony of the subscribing witnesses to this will.

*Scrimger*, the first witness, proves, that Corbin signed the name of the testator in his presence and by his direction. His testimony, therefore, is full and sufficient.

But, how stands the case as to David Barrick, the other witness? The verdict, as relates to his testimony, is as follows: that the said David Barrick, having been sent

for, "went to the house of James B. Burwell on the morning of the 4th of September, 1811, and found the said James B. Burwell sitting on the bed with the said paper writing in his hand," (meaning the paper writing previously attested by Scrimger,) "when the said James B. Burwell asked him to sign that paper, and the said David Barrick thereupon signed his name to the said paper writing, as a witness, in the presence of the said James B. Burwell; that the said Barrick then asked the said Burwell what it was that he had signed, and the said Burwell replied, it is my will, but you need not make a talk about it, it is time enough." And the jury then go on to say, that the said paper writing so attested or signed by Scrimger and Barrick, is the same which was admitted to record in the county court of Richmond on the 4th day of November, 1811, which is referred to in the proceedings and issue in this cause, and that Burwell was, at the time of the attestation of the said paper writing by the said Scrimger and Barrick, of sound mind and disposing memory.

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The substance of Barrick's testimony is, that at the request and in the presence of Burwell, he subscribed his name as a witness to the will, and heard Burwell acknowledge it to be *his will*. It becomes important to determine with precision, what is proved by this testimony. And here I will remark, that what shall, or shall not be a will, depends on the law, and not on the opinion, the wishes, or acknowledgment of the person making it. His acknowledgment does not prove it to be a *will*. If it did, it might prove a writing not signed, to be his will; or, it might prove a writing to be a will, which, although signed by the testator and attested by witnesses, was not subscribed by the witnesses in the presence of the testator. It is the province of *testimony* to establish *facts* only; the *law* arising from facts, thus established, belongs to another department. I readily admit, that in many cases, proof of the acknowledgment of a thing, is received as proof of the

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thing itself. Thus, if a man acknowledges his signature to a promissory note, proof of that *acknowledgment* is deemed proof of the *signature* itself; as much so as if the witness had *seen* him sign. And it is clear, that the same principle applies to wills. But, this is as to *facts* only. The acknowledgment proved by Barrick, "it is my will," must, therefore, be restricted to a recognition of the signature; and, in considering what such recognition proves, we must view it alone, unconnected with and unsupported by the testimony of other witnesses. Thus considered, what does it prove? Nothing more than that the will was signed by Burwell himself; or that it was signed by some other person for him, whose act he thus recognises and makes his own. These two facts, a signing by Burwell himself, and a signing by some other person for him, are so different in their nature, that the same acknowledgment cannot prove them both, as applies to the same will. It can prove only one of them. My *opinion* is, that the acknowledgment proved by Barrick, naturally refers to, and proves a signing by Burwell himself; and that it proves that, as effectually as if the witness had *seen* him sign. Barrick's testimony then, regarded as a single witness to a signing by the testator, is full and sufficient; and if Scrimger's testimony had been the same with Barrick's, the will must have been established. But as the case is, here is one witness proving a signing by the testator, and another proving a signing by some other person: and thus the requisites of the law, two witnesses to the same facts, are wanting, and of course the will cannot stand.

Admit, however, that the acknowledgment, "it is my *will*," refers to and proves a signing not by the testator, but by some other person, whose act is thus recognised, it surely can go no farther. It cannot be admitted to prove that such signing was *in the presence and by the direction of the testator*. These facts are distinct from, and additional to, the mere recognition of the signature; for,

a man may recognise a signature by some other person, which was made, neither in his presence, nor by his direction. The testimony of Barrick, therefore, if relied on to prove a signing by Burwell, but not by Corbin, is *deficient* in not proving that it was thus signed *in the presence, and by the direction of Burwell*. As Lord Hardwicke said, *(k)* requiring a will to be signed, means that some evidence shall arise from the hand-writing. It was intended as a guard against fraud and imposition; and so great is the importance attached to it by our statute, that where a will is not only signed by the testator, but wholly written by him, it dispenses with the attestation of subscribing witnesses altogether. If the will be not signed by the testator, but by some other person, it then substitutes another guard, in lieu thereof; it requires the signing to be in the presence and by the direction of the testator; which facts are to be proved by two witnesses. There being in this case, only one witness (*Scrimger*,) to these facts, the will cannot be established.

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I would not wish it to be understood as my opinion, that where a will is not signed by the testator, but by some other person, in his presence and by his direction, that the witnesses must hear the direction, and see the signing. My opinion is, that any other equivalent proof will be received; and I see no reason for excluding from such a case, the principle heretofore mentioned, that proof of the acknowledgment of a thing is equivalent to proof of the thing itself. If, therefore, it should be proved by two witnesses, that a man had acknowledged the signature to his will, as having been made by some other person, in his presence and by his direction, and had requested the witnesses to attest it as his will, who subscribed their names accordingly, I should have no hesitation, as at present advised, to pronounce it a will duly executed according to the statute.

*(k)* 2 Vesey, 499.



# APPENDIX.

No. 2.

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Pickett, &c. against Stewart and al.

(Decided April 13th, 1819, and referred to by Judge COALTER, in the case of *Miller's executors vs. Rice and others*. Ante, p. 447.)

Where a judgment has been obtained against an executor, who, from the perplexed state of the assets, and other causes, was unable to plead at law, a court of equity will afford relief.

This was a suit brought in the Richmond chancery court, by Pickett, Pollard, Johnston and Sheppard, administrators of John Pendleton, deceased.

The bill states, that Pendleton died intestate in the year 1806, very much involved in debt : that, among the creditors were Pickett, Pollard and Johnston, (the complainants,) whose claim was founded on a specialty : that, after they had examined the affairs of the estate, they found them involved in the greatest difficulties and uncertainty : for, although the said Pendleton had been engaged in business of various sorts, and had been the executor or administrator of various persons, it did not appear that he had kept a book of accounts, for thirty years : that, soon after the qualification of the complainants, many suits

were brought against them, as administrators, by the creditors, in different courts; some of which were founded on specialties, and others on simple contracts: that, among others, *Norman Stewart*, as assignee of *Neil McCoull*, brought a suit on a specialty, and recovered a judgment against them in November, 1807, for the sum of 136*l.* 17*s.*, to be discharged by the payment of 68*l.* 8*s.* 6*d.*, with interest from the first day of September, 1806. The complainants aver, that they never had, at any time, any assets in their hands, out of which they could properly have paid the said debt: that, no plea of “fully administered,” was put in by them, to the said suit, for the following reasons: Nearly the whole of the said *Pendleton*’s real and personal estate, had been conveyed to different persons, to satisfy debts due from him. It was some time after the qualification of the administrators, before the sales took place, for the purpose of satisfying the specific liens on the said property, and after that, some time elapsed before the accounts could be completely liquidated. The administrators could not, with any degree of certainty, ascertain, what amount would remain to pay other debts, after satisfying the specific liens; and they could not, with any certainty, ascertain what debts would be recovered from others, on account of the said *Pendleton*, as his accounts were very uncertain, and found on loose slips of paper only. They then enter into a detailed account of the state of the assets, to confirm the foregoing statement. They allege, that they could not have put in the plea of “fully administered” to the suit brought by *Stewart*, even as to those assets, which had come to their hands; because, there were several judgments obtained against the said *Pendleton* in his life-time, remaining unsatisfied, and some of them uncertain as to what was due, as accounts of payments made by him in his life-time were to be made up, in which, there was considerable difficulty, in consequence of the uncertainty of his memorandums. They then enumerate the claims,

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which will attach to the estate of the said Pendleton, on account of his administration on several estates, which had been committed to him in his life-time, and which were in a course of legal adjudication, the issue of which was uncertain; but which were afterwards decided against the administrators. They further allege, that their counsel in the case of Stewart, after putting in the plea of "payment by the intestate," when the cause was about coming on for trial, informed them that he could not put in the plea of "fully administered," while the affairs of the said estate were in that uncertain condition; and advised them, that they would be protected by the act of assembly, passed on the 13th day of January, 1807, "concerning the abatement of suits, and executors and administrators." Under these circumstances the judgment aforesaid of the said Stewart, was rendered. On that judgment a writ of *feri facias* was issued, and the administrators have paid the costs of the suit; but the debt itself and interest, they could not pay, for want of assets. The said Norman Stewart, assignee of Neil McCoull, has since brought suit for the same debt against the complainants, upon a charge of a *devastavit*, and they were ruled into a trial in the absence of the counsel, who had attended to the greater part of the business, notwithstanding a motion for a continuance on this ground; and a judgment was recovered against the complainants, for the amount of the said debt, with interest and costs. On this judgment an execution issued, which was levied on the property of the complainants, and they gave a forthcoming bond. They aver, that they have not any assets in their hands, out of which the said debt can be paid. They therefore pray, that the said judgment may be enjoined, until the subject can be investigated in a court of equity.

The court of chancery awarded the injunction.

*Norman Stewart* answered, that the judgment mentioned by the complainants to have been obtained against them

as administrators of John Pendleton, deceased, by the respondent as assignee of Neil McCoull, had been transferred to the said McCoull, for a valuable consideration. He disclaimed all knowledge or concern about the matters in dispute.

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*Neil McCoull* states in his answer, that the complainants might have had relief at law; that if the estate of the complainants' intestate had been as much involved as they represent, that circumstance might have been urged to the court as a reason for a continuance of the original suit; and if a motion to that effect had been made and overruled, they might have had relief in a superior court, or at least in a court of equity; or, if the complainants had shewn the difficulties and embarrassments mentioned in their bill, and that they had no assets, as they affirm, during the pendency of the said action against them, they might have applied to a court of equity to restrain proceedings at law, until they might have had a reasonable time to examine the situation of their intestate's affairs; or might have compelled the plaintiff in that action, to take a judgment *when assets*; and thus have thrown the burthen of proof upon him, to shew at any future time, that assets had come to the hands of the administrators, sufficient to discharge the judgment. But, instead of this, they thought proper to rely on the plea of payment, and on this plea, judgment was rendered against them. If the complainants had no notice at the time the original judgment was recovered against them by *Stewart*, assignee, &c., of the existence of claims of superior dignity, sufficient to consume the assets, they were bound to discharge the said judgment, and plead the same in bar, to suits subsequently instituted. If they had notice prior to that judgment, (which they do not pretend,) they ought to have pleaded those claims in bar, shewn that they were sufficient to swallow up the assets, and have given a judgment *when assets*. The defendant contends, that the original judgment recovered against the complainants, upon

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the plea of *payment*, is proof of assets in their hands, sufficient to discharge the same; and the return on the execution, "no effects," is conclusive evidence of waste. But, it is too late, after a judgment has been obtained against them on a plea of *no waste*, to rely on such grounds for relief.

As to the pretence that the complainants were improperly ruled into a trial in the absence of their counsel, it was competent to a superior court of law to correct the error. But the fact is, that they had counsel present in court, who had been long retained in the cause, and every way qualified to defend them.

On motion, the injunction was dissolved; and afterwards a motion to reinstate the injunction was rejected.

From this order of dissolution, an appeal was obtained on petition.

*April 13.*—Judge ROANE, delivered the opinion of the court :

The court is of opinion, that owing to the peculiar and perplexed state of the assets in this case, making it difficult, if not impracticable, for the appellants to have pleaded in relation to them at law; and owing also to the absence of the principal counsel of the appellants, and the withdrawal of the other at the trial in the second action, whereby the appellants were wholly undefended, and a verdict perhaps contrary to justice, obtained against them, without any negligence or default on their part, the order aforesaid is erroneous; therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellees do pay, &c.

And it is ordered that the injunction awarded the appellants, and dissolved by the order aforesaid, be reinstated, and the cause be remanded to the said court of chancery, to have an account of the assets taken, if required, in order to a final decree.

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1. See *Venditor and Vendee*, No. 1.
2. Where land is sold with general warranty, and a deed of trust given on the land itself to secure the payment of the purchase money, if an adverse claim to the land is afterwards discovered, a court of equity will join the sale under the deed of trust, until such adverse claim is regularly decided. *Gay vs. Hancock and others*, 72.
3. A court of equity, as well as a court of law, will interfere to prohibit the effect of contracts, made in violation of laws enacted for the public good. *Wilson vs. Spencer, &c.*, 76.
4. The principle in *pari delicto, &c.* does not apply to cases in which the act complained of, is interdicted by the positive provisions of a statute. *Ibid.*

These principles apply, as well to contracts prohibited under penalties, as to those expressly declared void by statute. *Ibid.*

5. See *Caveat*.
6. In a suit in chancery, where fraud is not put in issue by the pleadings, it cannot be introduced by the depositions. *Knibb's executor vs. Dixon's executor*, 249.
7. On a question whether an absolute bill of sale was intended only as a security, the evidence being contradictory, a court of chancery ought to direct an issue to try that point. *Ibid.*
8. In equity, it is competent for a creditor to prove that his claim was due from a partnership, although he may have taken a note from one of the partners, in his individual name. *Williams vs. Donaghe's executor*, 300.
9. A suit in equity may be maintained against a partnership, if one of the partners resides out of the state, although the remedy would have been at law, if they had both been residents of this state. *Ibid.*
10. Where an exception to a commissioner's report is correctly sustained by the court, upon the evidence produced, yet if there is good reason to believe that other evidence might be produced, to give the case a different result, and that such evidence has been withheld, in consequence of the commissioner's having allowed the item, the court of chancery ought not to pronounce a final decree, but to re-commit the account for further evidence and inquiry.
11. Land directed to be sold, is considered as money, unless an election be made to take it as land, by some person having a right to elect. *Tazewell and others vs. Smith's administrator*, 313.

12. A court of equity has jurisdiction for the recovery of slaves wherever a discovery is sought of the increase of female slaves, after a considerable lapse of time, and an account of hires and profits of a stock of slaves, where some of them may have been young and chargeable. *Gregory's administrator vs. Marks's administrator*, 355.

13. Where a dispute exists about the boundaries of land, and one of the parties yields his opinion, and acknowledges the right of his adversary, this acknowledgment shall not bind him, if at a future day, he finds that he was mistaken, unless the acknowledgment was founded on some consideration. *Stuart vs. Luddington*, 403.

14. See *Executor*, No. 2.

15. See *Executor*, No. 3.

### EQUITY OF REDEMPTION.

1. See *Dower*, No. 3.

### EVIDENCE.

1. A mere naked trustee, is a competent witness in a controversy, in which a creditor seeks to set aside the deed, on the ground of fraud. *Harvey, &c., vs. Alexander, &c.*, 219.
2. The certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence; but the deposition of the notary public, or some equivalent testimony, ought to be produced to the court. *Kield's administrator vs. Alexander's administrator*, 456.

### EXECUTOR.

1. Where an executor is sued in chancery, for a subject which is in part personal to himself, and in part touching his executorial character, he ought not to be compelled to give an *appeal bond* for the latter, as the subject is covered by his official bond. *Shearman, administrator, &c. vs. Christian and others*, 398.
  2. An executor, against whom judgments have been obtained at law, may be relieved in a court of equity, upon his shewing that assets sufficient to pay all the debts of the estate, came to his hands, but that a large portion of them, had been since recovered by a paramount title. *Royall's administrators vs. Johnson and others*, 421.
- Quere*, whether an executor ought not to be relieved in such a case, even if he had paid debts of inferior dignity, it appearing that he was promptly and *bona fide* paying off the debts of the estate, under the

belief that he had assets sufficient to discharge every claim. *Ibid.*

Where an executor confesses judgments, and gives forthcoming bonds, for debts due by his testator, under the belief that the assets of the estate are amply sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor shall be relieved in equity. *Miller's executors vs. Rice and others*, 438.

1. Where a judgment has been obtained against an executor, who, from the perplexed state of the assets and other causes, was unable to plead at law, a court of equity will afford relief. *Pickett, &c. vs. Stewart and al.*, 478.

## F

### FORTHCOMING BOND.

1. Where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury; or they may impanel a jury to try the issue, at their discretion. *Burke, administrator, &c. vs. Levy's executors*, 1.

2. Although the judgment on a forthcoming bond should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection cannot be sustained in the court of appeals. *Ibid.*

3. Where a motion is made to quash an execution and forthcoming bond, on the ground that a previous execution had issued, and a forthcoming bond taken for the same debt, which execution and bond it was alleged had been improperly quashed, the court will not enquire into the validity of the first execution and bond, upon the motion to quash the second. *Jett vs. Walker*, 211.

The judgment of a competent court will be considered right, until regularly reversed. *Ibid.*

### FRAUD.

1. In a suit in chancery, where fraud is not put in issue by the pleadings, it cannot be introduced by the depositions. *Knibb's executor vs. Dixon's executor*, 249.

2. No concealment or misrepresentation can have the effect of barring the rights of a party, unless another person is thereby induced to part with his money, or unless the concealment, &c. be so gross as to amount to fraud. *Stuart vs. Luddington*, 403.

### FRAUDULENT CONVEYANCE.

1. A deed may be fraudulent, if executed with a fraudulent intent, although founded upon a valuable consideration. *Briscoe and others vs. Clarke*, 213.

## H

### HABEAS CORPUS.

1. A judgment on a *habeas corpus* in favor of a slave, in the state of Ohio, does not establish his right to freedom. *Lewis vs. Fullerton*, 15.

### HUSBAND AND WIFE.

1. Where a husband and wife bring a suit in chancery for a division of the wife's property in slaves, to which she was entitled jointly with others, and an interlocutory decree is made, but never made final, *quære* in what cases the property shall be considered as belonging to the husband? *Gregory's administrator vs. Marks's administrator*, 355.

## I

### IMPROVEMENTS.

1. Where land has been recovered in ejectment, and the defendant goes into chancery, to obtain compensation for improvements, he will not succeed if he had notice of the plaintiff's title, at the time of making the improvements. *McKim vs. Moody and others*, 58.

### INFANTS.

1. In what cases, and under what circumstances, a court of equity will direct the sale of the real estate of infants. *Garland, &c., vs. Loving, &c.*, 396.

### INJUNCTION.

1. Where an injunction has been refused by a chancellor in open court, it is competent for a judge of the court of appeals, out of court, to award it. *Toll-bridge vs. Freebridge*, 206.

2. A judge of the court of appeals, may award an injunction, which has been refused by a chancellor in court, upon an office copy of the record in the chancery court being presented to him, as well as upon the original bill itself. *Ibid.*

3. A motion to reinstate an injunction on additional evidence tendered by the complainant, is in the nature of an original ap-

plication for an injunction; and on the refusal of the chancellor to reinstate, an application to the judges of the court of appeals or any of them, is proper. *Gilliam vs. Allen*, 414.

### INQUISITION.

1. See *ad quod damnum*, No 1.

### INSPECTORS.

See *Contribution*.

### ISSUE (in Chancery.)

On a question whether an absolute bill of sale, was intended only as a *security*, the evidence being contradictory, a court of chancery ought to direct an issue to try that point. *Knibb's executor vs. Dixon's executor*, 249.

## J

### JEOFAILS.

1. The proper construction of the 108th section of the act of jofails. *Beut vs. Patten, &c*, 25.
2. See *Ejectment*, No. 2.

### JUDGMENT.

1. A confession of judgment on a motion on a forthcoming bond, will operate as a release of errors in the *original* judgment. *Edmonds vs. Green*, 44.
2. Therefore, where an office judgment is erroneously entered up against the principal and *special* bail; the latter afterwards gives a forthcoming bond, and confesses judgment on it, he cannot avail himself of the error in the original judgment. *Ibid*.

### JUROR.

1. Where a juror, after he is sworn in an action of slander, expresses a wish to withdraw, because he himself had a similar suit depending in the same court, in which the slander was the same, but the counsel not consenting to withdraw him, the trial proceeds, and a verdict is rendered; the court ought not to grant a new trial. *Shobe vs. Bell*, 39.

## L

### LEGACY.

1. Where a legacy is left in trust, and the trustee refuses to act, the executor is not

bound to pay the legacy, until a new trustee is appointed by the court of chancery, and is not chargeable with interest before the decree. *Johnson vs. Mitchell*, 209.

2. A testator gives to his two nieces \$ 10,000 "in twelve months after marriage, provided they are then eighteen years of age; if not, at the age of eighteen." Although these words import a *joint interest* in \$ 10,000, they may be explained by circumstances to be collected from other parts of the will, to mean a legacy to each of his nieces, of \$ 10,000. *Trigg and wife vs. King's representatives*, 252.

### LEX LOCI.

1. A deed of emancipation executed in Ohio, but having reference to Virginia, will be void, unless it is recorded according to the laws of Virginia. *Lewis vs. Fullerton*, 15.

### LIEN.

A man purchases a tract of land, and gives bond and security for the purchase money, but never takes a conveyance, nor pays the money. The vendor does not lose his lien upon the land, by having taken personal security. *Hatcher's administrator vs. Hatcher's executors*, 53.

### LIMITATIONS.

1. The act of limitations, is a good plea to a suit in equity, brought to recover money collected by an attorney, for the plaintiff, and not accounted for by him. *Kinney's executors vs. McClure*, 284.
2. A judgment obtained against a testator in his life-time and not revived against his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations. *Peyton's administrator, vs. Carr's executor*, 436.
3. The operation of the statute, will not be prevented by a *scire facias* sued out, within the five years, on which the plaintiff suffered a non-suit. *Peyton's administrator vs. Carr's executor*, 436.

### LIS PENDENS.

1. During the pendency of a suit, to prevent the issuing of a patent, or the assignment of a survey, no person can obtain a patent for the same land under a treasury warrant, located since the institution of the suit; but he will be regarded as a purchaser with notice. *Lyns vs. Jackson, &c.*, 114.

**M**

**MARRIAGE CONTRACT.**

1. Where a marriage contract reserves to the wife, a power to give certain slaves to whomsoever she shall appoint, she is not authorised to direct a *sale* or *emancipation* of the slaves. *Ellis and others vs. Barber, executor, &c., 47.*
2. A marriage settlement made *after* marriage, in pursuance of articles entered into *before* marriage, is to be controlled by the articles. *Ibid.*

**MORTGAGE.**

1. See *Conditional Sale, No. 1.*

**N**

**NOTARY PUBLIC.**

1. The certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought not to be received in evidence; but the *deposition* of the notary public, or some equivalent testimony, ought to be produced to the court. *Kidd's administrator vs. Alexander's administrator, 456.*

**O**

**OFFICE JUDGMENT.**

1. It is error in a court of law to enter a judgment against a defendant, on the day after a conditional judgment has been confirmed at the rules. The defendant has until the next term after the conditional judgment is confirmed in the office, to set it aside, under the act of Assembly. *Green vs. Skipwith, 460.*

**P**

**PARI DELICTO.**

1. The principle in *pari delicto, &c.* does not apply to cases in which the act complained of, is interdicted by the positive provisions of a statute. *Wilson vs. Spencer, &c., 76.*
2. The person who merely takes the notes of an unchartered bank in payment, may not be as culpable as the institution which issues them. *Ibid.*

**PAROL AGREEMENT.**

1. A parol agreement for land, followed by part performance, enforced in a court of equity. *Wilde, &c. vs. Fox, &c., 165.*

**PARTIES.**

1. In a suit by the assignee of a legacy, which arises out of the sale of real property, the proceeds of which are to be divided among several persons; the assignee should make the other legatees interested in the sale of the property, parties. *Findlay, executor, &c. vs. Sheffey, 73.*
2. Where land is sold under a deed of trust, and the debtor impeaches the sale, he must make the *purchaser* a party, as well as the creditor. *Chowning vs. Cox and al., 306.*
3. Under what circumstances the heir at law ought to be made a party. *Tazewell and al. vs. Smith's administrator, 313.*

**PARTNERSHIP.**

1. See *Equity, No. 8, 9.*

**PLEADING.**

1. See *Alien Enemy, No. 1, 2.*
2. It is error for a plaintiff to reply and demur to the same plea. *Lang vs. Lewis's administrator, &c., 377.*
3. A replication by the administrator of a surviving partner must aver that the debt had not been paid to the deceased partner. A mere averment that the debt had not been paid to the *deceased* partner, will not be sufficient. *Ibid.*
4. See *Scire Facias, No. 1, 2, 3.*

**PROBAT.**

1. Where a deed is duly proved or acknowledged, and ordered to be recorded, and left with the clerk for that purpose, it shall be considered as recorded from that time, although it may never, in fact, be recorded, but is lost by the negligence of the clerk, or other accident. *Haverley vs. Ellis & Allan, and others, 102.*
2. *Quære.* If a deed be re-acknowledged after its execution, and the record of probat merely states in general terms, that it was proved by the oaths of the *subscribing* witnesses, the witnesses to the *acknowledgment* can be received to prove that it was admitted to probat on their evidence, and not on the evidence of the witnesses to the *original execution.* *Briscoe and others v. Clarke, 213.*
3. A deed not lodged to be recorded until eight months after its date, and not proved by the witnesses on whose testimony it was recorded, to have been sealed and delivered within eight months before it was recorded, is *not good as a recorded deed.* *Harvey, &c. vs. Alexander, &c. 219.*

## R

## RECORDING.

1. See *Probate*, No. 1.
2. See *Probate*, No. 3.

## RELEASE OF ERRORS.

1. See *Judgment*, No. 1, 2.

## REPLICATION.

1. See *Pleading*, No. 2, 3.

## ROADS.

1. Where a corporation is created by law, to erect a toll-bridge, at a given point, with the same power to apply to the county court "for leave to assure a road or roads, leading to the site proposed for said bridge, as given by the existing laws, to the owners of mills and public landings;" the expense of opening the said road, is to be defrayed by the county in which the road may lie. *Cartersville Bridge Company vs. Harrison & Cunningham*, 50.

## S

## SCIRE FACIAS.

1. A writ of *scire facias* need not set forth what goods, lands, &c. have been acquired by the defendant, since the date of the judgment. *Long vs. Lewis's administrator*, 277.
2. It is not a good plea to a *scire facias*, that the defendant had transferred, conveyed, &c. to the sheriff, goods and chattels, lands, &c. according to the act of assembly, to a greater value, &c., and that no proceeding had been had under the act of assembly against the said lands, &c. *Ibid.*
3. Nor is it a good plea that the defendant had transferred, in like manner, various debts, &c. and that the proceedings prescribed by the act of assembly, &c. to recover such debts, had not been had. *Ibid.*
4. See *Limitations*, No. 2, 3.

## SPECIFIC PERFORMANCE.

1. A parol agreement for land, followed by part performance, enforced in a court of equity. *Wilde, &c. vs. Fox, &c.* 165.
2. Where an agreement to make a lease is entered into upon certain terms, the party to whom the lease is to be made cannot enforce a specific performance, unless he

performs his part of the agreement, or offers to perform, and shows that he is willing and able to do so. *Harvie and others vs. Banks*, 408.

## T

TAIL, (*Estate*.)

1. A testator devises a tract of land to his daughter, H. L. "and to her and the heirs "of her body, and to them and their "heirs and assigns for ever;" and afterwards adds, "if my daughter H. L. "should decease, not having any lawful "heirs of her body," that then the land should become the property of his son D. L. These words convey an estate tail to H. L. and not a life estate. *Tidball vs. Lupton*, 194.
2. What words in a will since 1776, will convey an estate tail. *Kendall vs. Eyre*, 288.

## TAXES.

1. Where the lessee conveys certain lands to the lessor, as a collateral security for the payment of a debt to the lessor, and the lands so conveyed are lost by the non-payment of taxes, the lessor is not responsible for the value of the lands; but the lessee was bound to see to the payment of the taxes, he having a complete equitable title to the lands.

## TREASURY NOTE.

1. A treasury note is by the act of congress, assignable by delivery and assignment only. *Myers and Son vs. Friend and Scott*, 12.
2. Where a treasury note was assigned by the payee by endorsement in writing, to A. B. or order, then transferred by a blank endorsement by A. B., afterwards endorsed in full by C. D. (into whose hands it had regularly come) to E. F.; this note being afterwards stolen from the mail, and coming by a series of endorsements into the hands of a *bona fide* assignee, may be recovered in an action of detinue brought by C. D. against the holder. *Ibid.*

TRUST, (*Deed of*.)

1. Where a conveyance of real estate is made to a creditor, in trust to satisfy his own demand, such conveyance is not to be considered as a *deed of trust*, but as a *mortgage*, to which the right of redemption is incident. *Chowning vs. Cox et al.* 306.

U

USURY.

1. Where a party applies to a court of equity, to be relieved on the ground of usury, and does not call upon the defendant for a *discovery*, but proves his case by evidence *abunde*; *quære*, whether he can only be relieved to the amount of the usurious interest, upon paying the principal with lawful interest, or shall be relieved from the debt *in toto*. *McPherrin and others vs. King and others*, 172.

V

VENDOR AND VENDEE.

1. See *Lien*.
2. Where land is sold at public auction, and a third person makes a declaration in the hearing of the vendor and the bidders, that he is agent for persons having a claim to part of the land, but that an agreement has been made between him and the vendor, by which the purchaser shall not be injured by the conflicting claims, and the vendor remains silent, he shall be bound by such declaration. *Allen vs. Winston's adm'r.*, 65.

VERDICT.

1. Where a suit is brought against two persons on a bond executed by both, and it abates as to one by his death; a verdict finding only that the surviving defendant hath not paid the debt, is bad, and a new trial must be awarded. *Triplott vs. Micou*, 269.

VESTED ESTATE.

1. Where a testator directs his real estate to be sold, and the money arising from such sale to be paid to particular persons, the interest of the legatees is a *vested* one, although the will may give a discretion to the executor, as to the *time* of selling the estate. *Tazewell and others vs. Smith's adm'r.*, 313.
2. The principle will be the same, whether the estate devised to be sold, be an estate in possession, or only in remainder. *Ibid.*
3. The death of the devisee or legatee before the sale, will not defeat the interest, unless there is some provision in the will to that effect. *Ibid.*

W

WASTE.

1. It is not *waste* in a tenant in dower of coal lands, to take coal to any extent, from a mine already opened, or to sink new shafts into the same *vein* of coal. *Crouch vs. Puryear, &c.*, 253.
2. The tenant may penetrate through a seam already opened, and dig into a new seam that lies under the first. *Ibid.*

WILLS.

1. See *administration*, No. 1, 2.
2. What shall be deemed a due execution of a will, not signed by the testator, but by another for him. *Burwell and others vs. Corbin and others*, 131.

### **ERRATA**

In page 56, line 10, for *vendor* read *vender*.  
Do. 233, line 1, for *release* read *releascc*.













